SUPREME COURT, U.S.
FILED

No. (1)

09-934 FEB 3 - 2010

In The

Supreme Court of the United States

OFFICE OF THE CLERK

CLAYTON LEE PROCTOR, JR., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE LOCAL GOVERNMENT EMPLOYEE'S RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); AND THE STATE OF NORTH CAROLINA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's *Class Action Complaint* presents a Contract Clause claim. The *Complaint* contains detailed factual assertions and extensive references to North Carolina statutes which form the local government Retirement Plan. When Petitioner began employment in 1981 with the City of High Point Fire Department, he began contributing 6% of his monthly salary to the Retirement Plan. The Plan's statutes are contractual, not policy. The Plan's retirement benefits are delayed salaries, not gratuities. The North Carolina legislature did not reserve the right to diminish the Plan's retirement benefits retroactively. Petitioner became eligible to receive Plan benefits upon serving five years, the Plan vesting requirement. Before he completed five years of service, the legislature in 1982 repealed the Plan's 1981 disability retirement benefit statute. Petitioner became disabled and retired in 2003. The Retirement System paid Petitioner disability retirement benefits under the 1982 Plan statutes (which substantially diminished the contractual benefits specified in the 1981 Plan), thereby violating the Contract Clause.

The unpublished *Memorandum of Decision and Order* of the Superior Court dismissed the case for failure to state a Contract Clause claim for relief, which the North Carolina Court of Appeals affirmed. Petitioner's Contract Clause appeal of right to the Supreme Court of North Carolina was dismissed by *Order* for lack of a substantial constitutional question.

The Superior Court, the North Carolina Court of Appeals and the Supreme Court of North Carolina have decided important federal questions in a way which conflicts with relevant decisions of this Court, thereby warranting review by this Court.

1. Whether state courts may ignore the terms of a public employee contractual Retirement Plan and engraft upon the Plan terms not contained within the Plan for the purpose of dismissing the employee's Contract Clause claim?

2. Whether a substantial constitutional question is presented by a state court opinion which ignores the terms of a public employee contractual Retirement Plan and engrafts upon the Plan terms not contained within the Plan for the purpose of dismissing the public employee's Contract Clause claim?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceedings below.

Pursuant to this Court's Rule 29.6, the undersigned counsel states that none of the parties to this proceeding are publicly held companies.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF CONTENTS TO APPENDIX vi

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 6

A. Factual Background 7

B. Legal Background 10

C. Proceedings Below 13

REASONS FOR GRANTING THE WRIT 14

1. The *Memorandum of Decision* and the *Opinion* conflict with Contract Clause decisions of this Court 14

2. The *Order* conflicts with Contract Clause decisions of this Court 17

I. THE DECISIONS BELOW HAVE DECIDED AN IMPORTANT CONTRACT CLAUSE QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT 19

II. PENNIE IS DISTINGUISHABLE FROM THIS CASE 23

CONCLUSION 25

APPENDIX

TABLE OF CONTENTS TO APPENDIX

Page

Order of
The Supreme Court of North Carolina
Re: Dismissing Appeal
entered November 5, 2009 ..... App. 1

Decision of
The North Carolina Court of Appeals
Re: Affirming Decision of the Trial Court
entered April 7, 2009 ..... App. 3

Memorandum of Decision and Order of
The General Court of Justice,
Superior Court Division,
County of Wake,
North Carolina
Re: Dismissing Complaint
entered March 9, 2008 ..... App. 14

N.C. Gen. Stat. § 7A-30 ..... App. 23

N.C. R. App. P. 14 ..... App. 24

Plaintiff's Response to
Defendants' Motion to Dismiss Appeal to
The Supreme Court of North Carolina
entered June 1, 2009 ..... App. 26

Defendants' Motion to Dismiss Appeal to
The Supreme Court of North Carolina
entered May 27, 2009 ..... App. 34

Plaintiff's Notice of Appeal to
The Supreme Court of North Carolina
entered May 8, 2009 ..... App. 42

Plaintiff's Notice of Appeal to
The North Carolina Court of Appeals
entered April 7, 2008 ..... App. 53

Defendant's Motion to Dismiss Complaint
entered August 9, 2007 ..... App. 55

Complaint
entered July 25, 2007 ..... App. 60

U.S. CONST. art. I, § 10, cl. 1 ..... App. 77

N.C. Gen. Statutes ..... App. 78

TABLE OF AUTHORITIES

Page(s)

CASES

Bailey v. State,
500 S.E.2d 54 (N.C. 1997) 11, 12, 21, 22

Benton v. W.H. Weaver Construction Co.,
220 S.E.2d 417 (N.C. App. 1975) 10

Bridges v. City of Charlotte,
20 S.E.2d 825 (N.C. 1942) 11

Dodge v. Board of Education,
302 U.S. 74 (1937) ..... *passim*

Faulkenbury v. Teachers' & State Employees' Ret. Sys.,
483 S.E.2d 422 (N.C. 1997) ..... *passim*

General Motors Corp. v. Romein,
503 U.S. 181 (1992) ..... *passim*

George v. George,
444 S.E.2d 449 (N.C. 1994) 15, 22

Indiana ex rel. Anderson v. Brand,
303 U.S. 95 (1938) ..... *passim*

Isenhour v. Hutto,
517 S.E.2d 121 (N.C. 1999) 10

Pennie v. Reis,
132 U.S. 464 (1889) 23, 24

Simpson v. N.C. Local Gov't Employees' Retirement Sys.,
363 S.E.2d 90 (N.C. App. 1987),
aff'd per curiam,
372 S.E.2d 559 (N.C. 1988) 11, 12, 24

U.S. Trust Co. v. New Jersey,
431 U.S. 1 (1977) ..... *passim*

Whisnant v. Teachers' & State Employees' Ret. Sys.,
662 S.E.2d 573 (N.C. App. 2008),
cert. denied,
668 S.E.2d 783 (N.C. 2008),
cert. denied,
129 S. Ct. 1370, 173 L.Ed.2d 591 (2009) 19

CONSTITUTIONAL PROVISION

U.S. CONST. art. I, § 10, cl. 1 2

STATUTES

28 U.S.C. § 1257 1

29 U.S.C. § 1003(b)(1) 7

N.C. Gen. Stat § 7A-30 17

N.C. Gen. Stat. § 128-21 thru 128-38 ..... 7, 15

N.C. Gen. Stat. § 128-22 8

N.C. Gen. Stat. § 128-24 7

N.C. Gen. Stat. § 128-27 ..... *passim*

N.C. Gen. Stat. § 128-30 ..... 7, 8

N.C. Gen. Stat. § 128-35 8

N.C. Gen. Stat. § 135-18.4 13

RULES

Sup. Ct. R. 10(c) 14, 17, 19

N.C. R. App. P. 14 17

N.C. R. Civ. P. 12(b) 9, 10, 13

PETITION FOR WRIT OF CERTIORARI

Petitioner Mr. Clayton Lee Proctor, Jr. respectfully submits this Petition for a *writ of certiorari* to review the *Memorandum of Decision and Order* of the Superior Court, the *Opinion* of the North Carolina Court of Appeals, and the *Order* of the Supreme Court of North Carolina.

OPINIONS BELOW

The *Order* of the Supreme Court of North Carolina dismissing Petitioner's *Notice of Appeal* is reported at 686 S.E.2d 675 (N.C. 2009). The *Opinion* of the North Carolina Court of Appeals is an unpublished disposition, 674 S.E.2d 481 (Table), 2009 WL 920580 (N.C. App. 2009). The *Memorandum of Decision* of the Superior Court is unreported.

JURISDICTION

The Wake County Superior Court entered a *Memorandum of Decision* on March 9, 2008. Petitioner filed a *Notice of Appeal* to the North Carolina Court of Appeals on April 7, 2008. The North Carolina Court of Appeals entered an *Opinion* on April 7, 2009. Petitioner filed a *Notice of Appeal* with the Supreme Court of North Carolina on May 8, 2009. The Supreme Court of North Carolina dismissed the appeal by *Order* on November 5, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts.

U.S. Const. art. I, § 10, cl. 1.

STATUTORY PROVISIONS INVOLVED

N.C. Gen. Stat. § 128-27(c) (1981):

> Disability Retirement Benefits. — Upon the application of a member or of his employer, any member who has had five or more years of creditable service may be retired by the Board of Trustees, on the first day of any calendar month, not less than 30 and not more than 90 days next following the date of filing such application, on a disability retirement allowance: Provided, that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent, and that such member should be retired.

Pet. App. 96-97.

N.C. Gen. Stat. § 128-27(d3) (1981):

> (d3) Allowance on Disability Retirement of Persons Retiring on or

after July 1, 1971. — Upon retirement for disability, in accordance with subsection (c) above on or after July 1, 1971, a member shall receive a service retirement allowance if he has attained the age of 65 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to a service retirement allowance calculated on the basis of the member's average final compensation prior to his disability retirement and the creditable service he would have had at the age of 65 years if he had continued in service.

(2) Notwithstanding the foregoing provisions,

a. Any member whose creditable service commenced prior to July 1, 1971, shall receive not less than the benefit provided by G.S. 128-27(d2);

b. The amount of disability allowance payable from the *reserve* funds of the Retirement System to any member retiring on or after July 1, 1974, who is eligible for and in receipt of a disability benefit under the Social Security Act shall be seventy percent (70%) of the amount calculated under a above, and the balance shall be provided by the employer from time to time during each year in such amounts as may be required to cover

> such payments as current disbursements; and -
>
> c. The amount of disability allowance payable to any member retiring on or after July 1, 1974, who is not eligible for and in receipt of a disability benefit under the Social Security Act shall not be payable from the reserve funds of the Retirement System but shall be provided by the employer from time to time during each year in such amounts as may be required to cover such payments as current disbursements.

Pet. App. 100-01.

N.C. Gen. Stat. § 128-27(d3) (1982):

> (d3) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1971, but prior to July 1, 1982. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1971, but prior to July 1, 1982, a member shall receive a service retirement allowance if he has attained the age of 65 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:
>
> (1) Such allowance shall be equal to a service retirement allowance calculated on the basis of the member's average final compensation prior to his disability retirement and

the creditable service he would have had at the age of 65 years if he had continued in service.

(2) Notwithstanding the foregoing provisions,

a. Any member whose creditable service commenced prior to July 1, 1971, shall receive not less than the benefit provided by G.S. 128-27(d2);

b. The amount of disability allowance payable from the *reserve* funds of the Retirement System to any member retiring on or after July 1, 1974, who is eligible for and in receipt of a disability benefit under the Social Security Act shall be seventy percent (70%) of the amount calculated under a above, and the balance shall be provided by the employer from time to time during each year in such amounts as may be required to cover such payments as current disbursements; and

c. The amount of disability allowance payable to any member retiring on or after July 1, 1974, who is not eligible for and in receipt of a disability benefit under the Social Security Act shall not be payable from the reserve funds of the Retirement System but shall be provided by the employer from time to time during

> each year in such amounts as may be required to cover such payments as current disbursements.

Pet. App. 109-11.

N.C. Gen. Stat. § 128-27(d4) (1982):

> (d4) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and credible servers he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

Pet. App. 111-12.

STATEMENT OF THE CASE

The Questions Presented raise threshold Contract Clause questions: (1) whether state courts may ignore the terms of a public employee contractual Retirement Plan and engraft upon the Plan terms not contained within the Plan for the purpose of dismissing the employee's Contract Clause claim? and (2) whether a substantial

constitutional question is presented by a state court opinion which ignores the terms of a public employee contractual Retirement Plan and engrafts upon the Plan terms not contained within the Plan for the purpose of dismissing the public employee's Contract Clause claim?

The *Memorandum of Decision, Opinion* and *Order* have each decided an important Contract Clause question in a way that conflicts with relevant decisions of this Court in *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *General Motors Corp. v. Romein*, 503 U.S. 181 (1992); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Dodge v. Board of Education*, 302 U.S. 74 (1937).

A. Factual Background.

Petitioner's *Class Action Complaint* presents a Contract Clause claim. Pet. App. 60-76. The *Complaint* contains detailed factual assertions and extensive references to North Carolina statutes forming a local government Retirement Plan. Petitioner began employment with the City of High Point Fire Department in 1981. Pet. App. 63. The Retirement Plan (North Carolina Local Governmental Employees' Retirement System, N.C. Gen. Stat. Chapter 128 Article 3, §§ 128-21 thru 128-38 (1981)), was in place.[1] Pet. App. 63-64. The Plan required Mr. Proctor upon employment with the Fire Department to become a Plan member and to contribute 6% of his salary monthly to the Plan's pension fund. N.C. Gen. Stat. §§ 128-24(1), 128-30(b)(1)&(2) (1981). Pet. App. 82; 104-05. Local

[1] The Employee Retirement Income Security Act ("ERISA") does not apply to public employee retirement plans. 29 U.S.C. § 1003(b)(1).

government employers are required to make actuarial based monthly contributions to the Retirement System's pension fund. N.C. Gen. Stat § 128-30(d)(2) & (g). Pet. App. 105-08. The purpose of the Retirement Plan is to provide retirement allowances for local government employees. N.C. Gen. Stat. § 128-22 (1981). Pet. App. 81. The Plan's maintenance of reserves and the payment of all retirement allowances are obligations of the pension accumulation fund. N.C. Gen. Stat. § 128-30(d) (1981). Pet. App. 105-06. "All income, interest and dividends derived from deposits and investments authorized by this Article shall be used for the payment of the said obligations of said fund." N.C. Gen. Stat. § 128-35. Pet. App. 108-09.

The Plan's 1981 terms and conditions for disability retirement are contained in §§ 128-27(c) and 128-27(d3) (1981). Pet. App. 63; 96; 100-01. When properly read in tandem, those two statutes provide: if a local government employee works for five years or more and if the Retirement System Medical Board, on or after July 1, 1971, determines that the employee has become permanently disabled from work, then the employee shall receive disability retirement benefits calculated as if the employee had worked to age 65. Pet. App. 69.

Effective July 1, 1982, the North Carolina legislature retroactively and adversely amended § 128-27(d3) (1981) (the Plan's disability retirement statute in place when Mr. Proctor began employment) and enacted § 128-27(d3) (1982). Pet. App. 63; *compare* Pet. App 100-01 *with* Pet. App 109-11. This statute limited retirement benefits to persons who had retired on disability prior to July 1, 1982. When N.C. Gen. Stat. §

128-27(d3) (1982) became effective, Mr. Proctor had begun employment with the Fire Department although he had not completed the required five years of service for benefit eligibility, and, therefore, had not vested in the Plan. Pet. App. 63. On the same date of the adverse retroactive amendment, § 128-27(d3) (1982) became effective (and retroactively applied only to employees who became permanently disabled before July 1, 1982), the legislature enacted § 128-27(d4) (1982). Pet. App. 67 & 68 & 69. This statute provided, in essence, that an employee who became disabled on or after July 1, 1982 shall receive benefits as if the employee had worked to age 65 or obtained 30 years of service, whichever came first. Pet. App. 69 & 70.

Upon becoming permanently disabled, Mr. Proctor began receiving monthly Plan disability retirement benefits calculated as if he worked to age 65 or obtained 30 years service (which ever occurred first) in accordance with § 128-27(d4) (1982) (the statute in place when he became benefit eligible and thereby vested in the Plan) rather than in accordance with § 128-27(d3) (1981) which would have calculated his monthly benefits as if he had worked to age 65 (the statute in place when he began work with the Fire Department). Pet. App. 69. The payment of Mr. Proctor's monthly disability retirement benefit in accordance with § 128-27(d4) (1982) rather than § 128-27(d3) (1981) resulted in a substantial diminishment of his benefits, thereby violating the Contract Clause. Pet. App. 69-70, 74. The *Complaint* states a valid Contract Clause claim that should not have been dismissed per Rule 12(b). Pet. App. 61-70, 74.

B. Legal Background.

The Superior Court in a *Memorandum of Decision* dismissed the *Complaint* on the basis of Rule 12(b) of the North Carolina Rules of Civil Procedure for failure to state a Contract Clause claim. Pet. App. 14-22. The Superior Court Judge premised his ruling by engrafting a vesting requirement upon the Retirement Plan and the right of the legislature to modify the Plan prior to Mr. Proctor's serving the required five years for vesting in the Plan. Pet. App. 21-22. The North Carolina Court of Appeals in the *Opinion* also engrafted a vesting requirement upon the Retirement Plan and affirmed the dismissal for failure to state a Contract Clause claim. Pet. App. 3-13. The test for a Rule 12(b) review is "whether the complaint when liberally construed states a claim for this plaintiff in this case against this defendant upon which relief can be granted on any theory." *Id.* at 12 (quoting *Benton v. W.H. Weaver Construction Co.*, 28 N.C.App. 91, 95, 220 S.E.2d 417, 420 (1975)).[2] The Supreme Court of North Carolina dismissed Mr. Proctor's Contract Clause appeal as a matter of right on the basis that the appeal did not present a substantial constitutional question. Pet. App. 1-2.

With one factual exception, Mr. Proctor is identically situated to the disabled retirees in the

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[2] "When reviewing the denial of a motion to dismiss pursuant to [N.C. R. Civ. P. 12(b)(6)] the factual allegations in plaintiff's complaint are treated as true." *Isenhour v. Hutto*, 517 S.E.2d 121, 124 (N.C. 1999). A motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6) should not be granted *"unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."* *Id.* (italics in original).

seminal North Carolina public employee Contract Clause case, *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 363 S.E.2d 90 (N.C. App. 1987), *aff'd per curiam*, 372 S.E.2d 559 (N.C. 1988), the disabled retirees in *Faulkenbury*, 483 S.E.2d 422 (N.C. 1997), and the taxpayer retirees in *Bailey v. State*, 500 S.E.2d 54 (N.C. 1997). The difference is that the *Simpson*, *Faulkenbury* and *Bailey* retirees had served the five years necessary for eligibility to receive retirement benefits (thereby vesting in the Plan) prior to the legislative repeal of the Plan statutes that were held to violate the Contract Clause.

The Supreme Court of North Carolina long ago established that public employee pensions are delayed salaries. "We held [in *Bridges v. City of Charlotte*, 20 S.E.2d 825 (N.C. 1942)] that pensions for teachers and state employees were delayed salaries. If they [the pensions] were gratuities, we said, they would run afoul of proscription of special emoluments as provided in our state Constitution." *Faulkenbury*, 483 S.E.2d at 427. *Simpson* unpacked the logic of *Bridges*, reasoning: "If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then the employee has contractual rights to it. **The agreement to defer the compensation is the contract.**" *Simpson*, 363 S.E.2d at 94 (emphasis added).

Simpson held: (1) "In North Carolina the right of members of the Retirement System to retirement benefits vests after five years of creditable service." *Simpson*, 363 S.E.2d at 92 n.2 (citing § 128-27(a)(1), (c)); (2) "[T]he relationship between plaintiffs [firefighters] and the Retirement System is one of contract." *Simpson*,

363 S.E.2d at 93; (3) "the North Carolina [Retirement Plan] General Statutes create contractual obligations." *Id.* at 93-94; and (4) the plaintiffs had a "contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested." *Id.* at 94; *accord Faulkenbury* 483 S.E.2d at 427; *Bailey*, 500 S.E.2d at 60.[3]

Faulkenbury rejected the State of North Carolina's argument that the Retirement Plan statutes "are not promises, but only state a policy which the General Assembly [the legislature] may change." 483 S.E.2d at 427. *Faulkenbury* then addressed the issue of the time when the contract between the Retirement System and the employee was formed:

> We believe that a better analysis is that at the time the plaintiffs started working for the state or local government, the [Retirement Plan] statutes provided what the plaintiffs' compensation in the way of retirement benefits would be. The plaintiffs

[3] The proposition that "Retirement Plan Members may not rely on the terms of the retirement plan as they existed prior to their vesting date" is not the logical converse of the proposition "Retirement Plan members have a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested." For example, the proposition "If x is an apple, then x is a fruit" is a true proposition. However, one commits a logical fallacy by asserting that the converse of "If x is an apple, then x is a fruit" is "If x is not an apple, then x is not a fruit." This fallacy has been denominated the fallacy of "Denying the Antecedent."

> accepted these offers when they took the jobs. This created a contract.

Id.

Faulkenbury further held that the legislature did not reserve the right to diminish the Plan's benefits. "The defendants [State and Retirement System] next contend that the General Assembly reserved the right to amend the retirement plans for state . . . employees by N.C.G.S. § . . . 135-18.4 . . . [This section] . . . [has] no application to this case." *Faulkenbury*, 483 S.E.2d at 427. The *Faulkenbury* defendants, among the same defendants in this case, acknowledged that "the General Assembly [the legislature] did not originally reserve the right to change the retirement benefits . . . ." *Id.*

C. Proceedings Below.

Mr. Proctor filed a *Complaint* in the Superior Court of Wake County on July 25, 2007. Pet. App. 60. The *Complaint* included a Contract Clause claim. Pet. App. 62-70. Defendants moved to dismiss the *Complaint* pursuant N.C. R. Civ. P. 12(b)(6) on August 29, 2007. Pet. App. 55. The Superior Court dismissed the *Complaint* by *Memorandum of Decision* on March 9 2008. Pet. App. 14-22. Mr. Proctor filed a *Notice of Appeal* to the North Carolina Court of Appeals on April 7, 2008. Pet. App. 53. The Court of Appeals, without the benefit of oral argument, in a May 8, 2009 unpublished *Opinion* affirmed the Superior Court. Pet. App. 3-13. Mr. Proctor filed a *Notice of Appeal* for his Contract Clause Claim as a matter of right with the Supreme Court of North Carolina on May 8, 2009. Pet. App. 42. Defendants filed a *Motion to Dismiss Appeal* with

the Supreme Court of North Carolina on May 27, 2009. Pet. App. 34. Mr. Proctor filed *Appellant's Response to Appellees' Motion to Dismiss Appeal* on June 1, 2009. Pet. App. 26. The Supreme Court of North Carolina granted Defendants' *Motion* and dismissed Mr. Proctor's appeal for lack of a substantial constitutional question by *Order* dated November 5, 2009.

REASONS FOR GRANTING THE WRIT

This Court's review is warranted on the basis of Sup. Ct. Rule 10(c). Namely, the Superior Court, the North Carolina Court of Appeals, and the Supreme Court of North Carolina decided important Contract Clause questions in a way that conflicts with relevant decisions of this Court in *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *General Motors Corp. v. Romein*, 503 U.S. 181 (1992); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Dodge v. Board of Education*, 302 U.S. 74 (1937).

1. The *Memorandum of Decision* and the *Opinion* conflict with Contract Clause decisions of this Court.

The Superior Court correctly acknowledges the applicability of *U.S. Trust* in assessing a Contract Clause case. Pet. App. 16. Likewise, the Court of Appeals acknowledges that a Contract Clause case must "apply a three step analysis" specified in *U.S. Trust*, which includes the step of determining whether a contract exists. Pet. App. 8. It is axiomatic that in order to determine whether a contract exists, a court should first undertake an examination of the terms contained within the proffered contract. Nonetheless, without even examining the

Retirement Plan's terms, the Court of Appeals asserts: "It is only at the time an employee's rights have vested that a contract is formed." Pet. App. 9-10 (emphasis added). This assertion on its face refutes itself and is, therefore, an absurdity. A contract, as a matter of elementary logic, cannot be formed after the employee fulfills the vesting requirement (which must in the first place be contained within the contract) of working five years before the employee is eligible for benefits under the Retirement Plan. A vesting provision, which itself must be contractual, cannot exist on its own feet dangling outside a contract's perimeter. Nonetheless, the Court of Appeals again embraces this absurdity: "In the present case, however, Plaintiff had not completed five years of service at the time Subsection (d4) came into effect. Therefore, his rights had not yet vested and there was no contract under Subsection (d3)." Pet. App. 10.

The concept of "vesting" in the context of a retirement plan means that "an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future . . . ." *George v. George*, 444 S.E.2d 449, 450 (N.C. 1994) (citations omitted). In sum, the *Opinion* superimposes a vested right as a necessary condition for a valid Contract Clause claim, thereby rewriting the Plan in violation of the Contract Clause. The *Memorandum of Decision* is infected with the same fallacy. Pet. App. 21-22.

Nowhere within the four corners of the Retirement Plan does the Plan state that a contract is formed when an employee's rights have vested after five years service! *See* N.C. Gen. Stat. §§ 128-21 thru 128-38. Pet. App. 78-

109. Nowhere within the four corners of the Retirement Plan can one locate the provision that there is no contract between the public employee and the Retirement System until the employee serves five years, thereby vesting in the Plan. *Id.* Nowhere within the four corners of the Retirement Plan does the Plan state that the terms of the Plan and the employee's vesting in the Plan arise simultaneously. *Id.* A review of the *Memorandum of Decision* (*see* Pet. App. 17, 21-22) and the *Opinion* (*see* Pet. App. 9-10) reveal that both the Superior Court and the Court of Appeals engrafted upon the Retirement Plan terms which are not contained within the perimeter of the Plan.

An assessment of whether the Contract Clause has been violated requires an assessment of the pertinent statutes. *Brand*, 303 U.S. at 100. This assessment involves the application of two threshold principles. "In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute." *Dodge*, 302 U.S. at 78. The "cardinal inquiry" focuses upon the terms of the statutes alleged to have created a Contract Clause contract. *Brand*, 303 U.S. at 104. Hence, the United States Supreme Court has specified analytic principles which must be utilized in examining an instrument claimed to have Contract Clause protection.

The *Memorandum of Decision* and the *Opinion* inexplicably failed to examine the terms of the Retirement Plan in order to determine whether a contractual relationship exists between Mr. Proctor and the Retirement System with respect to N.C. Gen. Stat. § 128-27(d3) (1981) (the Plan's disability retirement statute on the books

when Mr. Proctor began employment). *See* Pet. App. 3-13; 14-22. Thus, the *Memorandum of Decision* and the *Opinion* violate the threshold requirement of Contract Clause analysis, namely, examination of the terms of the contract in order to determine what are the terms of the claimed contract. *See U.S. Trust*, 431 U.S. at 3-6; *Romein*, 503 U.S. at 183-85; *Brand*, 303 U.S. at 100; *Dodge*, 302 U.S. at 78. The Contract Clause jurisprudence of this Court prohibits State courts from retroactively inserting terms into and thereby rewriting public contracts for which the State did not reserve the right to adversely and retroactively modify the contract. If the converse were true, States could rewrite public contracts to their own benefit and with assistance from State court judges do so with impunity, thereby substantially impairing the Contract clause itself. Since the *Memorandum of Decision* and the *Opinion* decided an important Contract Clause question in a way that conflicts with relevant decisions of this Court, the requested *writ of certiorari* should be granted per Sup. Ct. Rule 10(c).

2. The *Order* conflicts with Contract Clause decisions of this Court.

After the *Opinion* was entered, Mr. Proctor filed a *Notice of Appeal* to the Supreme Court of North Carolina. Pet. App. 42. An appeal lies of right to the Supreme Court of North Carolina from any decision of the North Carolina Court of Appeals directly involving a substantial question arising under the Constitution of the United States. N.C. Gen. Stat. § 7A-30, Pet. App. 23; N.C. R. App. Rule 14, Pet. App. 24. The *Notice of Appeal* states the following:

> The constitutional question arising under the Contract Clause which is presented in this appeal is substantial for at least 10 reasons: . . .. [1] The United States Supreme Court, contrary to the *Opinion*, has never held that possession of a "vested right" is a necessary condition for a valid Contract Clause claim; . . .. [7] the *Opinion* violates the "four corners" contract principle restraining courts from adding terms to an instrument, the Retirement Plan, by essentially adding "vesting" as a precondition to the activation of the Plan's terms.

Pet. App 47-48; 50.

The *Notice of Appeal* quoted above references a substantial Contract Clause question. The preceding section of this *Petition* proves that the *Opinion* decided important Contract Clause questions in ways that conflicts with relevant decisions of this Court. Without explanation, the Supreme Court of North Carolina dismissed Mr. Proctor's Contract Clause appeal "for lack of [a] substantial constitutional question . . .." Pet. App. 2. Since the preceding section of this petition proves that the *Memorandum of Decision* and the *Opinion* decided an important Contract Clause question in a way that conflicts with relevant decisions of this Court, the *Order* also decided an important Contract Clause question in a way that conflicts with relevant decisions of this

Court. Hence, the requested *writ of certiorari* should be granted per Sup. Ct. Rule 10(c).[4]

I. THE DECISIONS BELOW HAVE DECIDED AN IMPORTANT CONTRACT CLAUSE QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The preceding section of this *Petition* proves that the *Memorandum of Decision*, the *Opinion*, and the *Order* decided an important Contract Clause question in a way that conflicts with relevant decisions of this Court. *Brand*, *Dodge*, *U.S. Trust*, and *Romein* each examine in detail the specific language contained within the pertinent statutes for which Contract Clause protection is claimed. *See Brand*, 303 U.S. at 100; *Dodge*, 302 U.S. at 78; *U.S. Trust*, 431 U.S. at 3-6; *Romein*, 503 U.S. at 183-85.

Neither the *Memorandum of Decision*, nor the *Opinion*, nor the *Order* examined the actual language of the pertinent provisions of the contractual Retirement Plan. Hence, the *Memorandum of Decision*, the *Opinion*, and the *Order* are in conflict with *Brand*, *Dodge*, *U.S. Trust*, and *Romein*.

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[4] This Court last year denied a *writ of certiorari* in a Contract Clause case involving the same statutory Retirement Plan terms, though different statutes, as the statutory Retirement Plan terms in this Contract Clause case. *Whisnant v. Teachers' & State Employees' Ret. Sys.*, 191 N.C. App. 233, 662 S.E.2d 573 (2008), *cert. denied*, 362 N.C. 513, 668 S.E.2d 783 (2008), *cert. denied*, 129 S. Ct. 1370, 173 L.Ed.2d 591 (2009).

An examination of the terms of the Retirement Plan reveals that, contrary to the *Memorandum of Decision* and the *Opinion*, nowhere does the contractual Plan state that only at the time an employee's rights have vested that a contract is formed between the employee and the Retirement System. The pertinent provisions of the Plan are N.C. Gen. Stat. §§ 128-27(c) and (d3) (1981).

N.C. Gen. Stat. § 128-27(c) (1981) states:

> Disability Retirement Benefits. - Upon the application of a member ... any member who has five [5] or more years of creditable service may be retired ... on a disability allowance: Provided, that the medical board ... shall certify that the member is mentally or physically incapacitated for further performance of duty ..., [and] that such incapacity is likely to be permanent, and that such member should be retired.

Pet. App. 96-97.

N.C. Gen. Stat. § 128-27(d3) (1981) states:

> Allowance on Disability Retirement of Persons Retiring on or after July 1, 1971. - Upon retirement for disability, in accordance with subsection (c) above on or after July 1, 1971, a member shall receive ... a disability retirement allowance which shall be computed as follows: (1) Such allowance shall be equal to a service retirement allowance calculated on the

> basis of the member's average final compensation prior to his disability retirement and the creditable service he would have had at the age of 65 years if he had continued in service.

Pet. App. 100.

Upon reading sections (c) and (d3) in tandem, the terms of the contract between Mr. Proctor and the Retirement System are transparent. Namely, if Mr. Proctor works at least five years and is permanently unable to do his job, then he shall receive a disability retirement benefit calculated as if he had worked to age 65. Pet. App. 69. Hence, the "five years" of service specified in section (c) is a "precondition" which the employee must fulfill before he can become eligible for disability retirement under the benefit terms specified in section (d3). The "five years" of service in section (c) is not the date when the terms of the disability contract between him and the Retirement System are specified. In a nutshell, the *Memorandum of Decision* and the *Opinion's* holdings confused the nonsensical notion of vesting as a precondition for formation of the Plan with the recognized concept of vesting as a precondition for receipt of Plan benefits.

Bailey v. State, 500 S.E.2d 54 (N.C. 1998) makes it abundantly clear that the years of service requirement in the Retirement Plan is a "precondition" for receipt of benefits.

> Each of these [retirement] systems contains certain preconditions to the receipt of benefits. The primary one is the requirement that employees work a predetermined amount of time in

> public service before they are eligible for retirement benefits. After employment for the set number of years, the employee is deemed to have "vested" in the system. Thereafter, the employee generally guaranteed a percentage payment at retirement base upon years of service.

Bailey, 500 S.E.2d at 58.

Bailey's analysis explicates the term "precondition" in a manner synonymous with the definition of Plan "vesting". *Cf. Bailey*, 500 S.E.2d at 58 *with George v. George*, 444 S.E.2d 449, 450 (N.C. 1994) (citations omitted) ("vesting" in the context of a retirement plan means that "an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future . . . ."). In sum, "vesting" is not some metaphysical property that preconditions the formation of a contractual relationship between Mr. Proctor and the Retirement System.

The *Memorandum of Decision* and the *Opinion*, in contravention of this Court's Contract Clause jurisprudence, rewrote the Retirement Plan by engrafting upon the Plan the additional term of vesting in the Plan as a simultaneous precondition for the terms of the Plan to be specified and for the formation of the contract between Mr. Proctor and the Retirement System to occur. Since the legislature did not reserve the right to change the Plan's benefits, the Superior Court's assertion that the legislature had the right to change the Plan adversely prior to Mr. Proctor's serving five years and vesting in the Plan is demonstrably erroneous. *Compare*

Memorandum of Decision ("Until the date of vesting, the General Assembly was free to change the benefits . . .") Pet. App. 22 *with Faulkenbury*, 483 S.E.2d at 427 (rejecting the State's contention that the General Assembly reserved the right to amend the Retirement Plans).

Mr. Proctor became permanently disabled after 22 years of service with the Fire Department. At the time of his disablement, he met the precondition of five years service for eligibility for disability benefits to be calculated in accordance with § 128-27(d3) (1981), the disability retirement statute in place when he began employment with the Fire Department. A proper application of this statute to Mr. Proctor would have resulted in his monthly disability retirement benefits being paid as if he had worked to age 65. Pet. App. 64, 68, 69. Mr. Proctor's monthly disability retirement benefit, however, is being paid in accordance with § 128-27(d4) (1982), the statute in place at the time he had completed five years of service and thereby became eligible for Plan benefits. Pet. App. 69, 70. The payment of Mr. Proctor's monthly disability retirement benefit in accordance with § 128-27(d4) (1982) rather than § 128-27(d3) (1981) resulted in a substantial diminishment of his benefits, thereby violating the Contract Clause. Pet. App. 69-70, 74.

II. PENNIE IS DISTINGUISHABLE FROM THIS CASE.

Pennie v. Reis, 132 U.S. 464, 470-72 (1889) addressed the question of whether California's repeal of a police officer's life insurance plan prior to the death of the officer violated the Due Process Clause. *Pennie* reasoned: since the

officer neither received nor controlled the $2 monthly deduction from what was called his salary, the $2 deduction was really always the State's money and, therefore, not really part of his salary. *Id.* Upon finding the deceased officer had no "vested" property right in the continuance of the insurance fund and "no contract" with the State, *Pennie* concluded that repealing the life insurance plan and using the plan's funds for other purposes prior to the officer's death did not violate the Due Process Clause. *Id.*

The *Pennie* life insurance plan is distinguishable from the Retirement Plan in several significant respects. *Pennie* deemed the plan a gratuity, whereas the Retirement Plan is a contract between the Retirement System and local government employees. *Compare Pennie*, 132 U.S. at 472 with *Simpson*, 363 S.E.2d at 93-94; *Faulkenbury*, 483 S.E.2d at 427. The Retirement Plan benefits are delayed salaries, whereas the *Pennie* plan was a gratuity. *Compare Faulkenbury*, 483 S.E.2d at 427 *with Pennie*, 132 U.S. at 470-72. The North Carolina legislature did not reserve the right to diminish the Plan's benefits, whereas the California legislature did so. *Compare Faulkenbury*, 483 S.E.2d at 427 *with Pennie*, 132 U.S. at 470-72. Mr. Proctor's monthly salary contribution to the Plan trust funds is his money. *See* N.C. Gen. Stat. 128-27(f) Return of Accumulated Contributions (the Plan member has a right to withdraw his salary "contributions" to the Plan plus "accumulated regular interest thereon" upon retirement). Pet. App. 102. The *Pennie* officer did not have a right to withdraw upon retirement the life insurance deductions from his salary. 132 U.S. at 470-72.

CONCLUSION

The Superior Court wrongly claimed that the legislature could change the Retirement Plan adversely at any time before Mr. Proctor served five years necessary for benefit eligibility and thereby vesting in the Plan, contrary to *Faulkenbury*'s controlling holding that the State did not reserve the right to change the Plan. The Court of Appeals' assertion that "It is only at the time an employee's rights have vested that a contract is formed" is absurd on its face. The Supreme Court of North Carolina dismissed Mr. Proctor's Contract Clause appeal for lack of a substantial constitutional question, notwithstanding the Court of Appeals' ignoring the terms of the Retirement Plan and wrongly engrafting upon the Plan terms not contained within the Plan, in contravention of the threshold inquiry mandated by *Brand*, *Dodge*, *U.S. Trust*, and *Romein*.

The petition for the *writ of certiorari* should be granted. The case should be remanded to the Supreme Court of North Carolina with the instruction to reinstate Mr. Proctor's appeal, to review the terms of the Retirement Plan, and to abstain from engrafting terms onto the Plan.

Respectfully submitted,
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Entered November 5, 2009

No. 193A09 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Proctor v. Local Government Employees' Retirement System)

CLAYTON LEE PROCTOR, Jr., on behalf of himself and all others similarly situated

v.

LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE LOCAL GOVERNMENT EMPLOYEE'S RETIREMENT SYSTEM, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA

From NC Court of Appeals
(08-976)
From Wake
(07CVS11806)

****

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiff-Appellant on the 8th of May 2009 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendants, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 5th of November 2009."

s/ Hudson, J.
For the Court

Entered April 7, 2009

NO. COA08-976

NORTH CAROLINA COURT OF APPEALS

CLAYTON LEE PROCTOR, Jr., on behalf of himself and all others similarly situated

v.

LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE LOCAL GOVERNMENT EMPLOYEE'S RETIREMENT SYSTEM, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA

From Wake County
No. 07 CVS 11806

****

Appeal by Plaintiff from judgment entered 10 March 2008 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 26 January 2009.

Schiller & Schiller, by David G. Schiller, Kathryn H. Schiller and Marvin Schiller, for Plaintiff-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for Defendants-Appellees.

BEASLEY, Judge.

Clayton Lee Proctor, Jr. (Plaintiff) appeals from the trial court's order dismissing his class action claim under N.C.R. Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. We affirm.

Plaintiff is a retired member of the High Point Fire Department. Defendants are the Local Governmental Employees' Retirement System (Retirement System), the Board of Trustees of the Retirement System, the Department of State Treasurer, Retirement Systems Division, Richard H. Moore, former Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina, and the State of North Carolina.

Plaintiff began employment with the State of North Carolina in April 1981 when N.C. Gen.Stat.. 128-27(d3)(1981)(Subsection (d3)) was in effect. This statute outlined provisions for certain disability retirement benefits to local government employees. Subsection (d3) stated the following:

> Allowance on Disability Retirement of Persons Retiring on or after July 1, 1971.- Upon retirement for disability, in accordance with subsection (c) above on or after July 1, 1971, a member shall receive a service retirement allowance if he has attained the age of 65 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:
>
> (1) Such allowance shall be equal to a service retirement allowance calculated on the basis of the member's average final compensation prior to his disability retirement and the creditable service he would have had at the age of 65 years if he had continued in service.

Subsection (c) of N.C. Gen.Stat.. 128-27 contains the same language today as when Plaintiff was hired. It states: Disability Retirement Benefits.- Upon the application of a member or of his employer, any member who has had five or more years of creditable service may be retired by the Board of Trustees, ... on a disability retirement allowance....Subsections (d3) and (c), read together, provided that an employee who became disabled after five years of service, and who retired due to a disability on or after July 1, 1971, would receive a retirement allowance calculated as if the employee had worked until age sixty-five.

In 1982, the North Carolina General Assembly amended N.C. Gen.Stat.. 128-27 to add

128-27(d4) (1982) (Subsection (d4)). Subsection (d4) states that:

> Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982. Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

Subsection (d4) thus provided that the monthly retirement allowance for a local government employee who became disabled in the course of his employment after five years of service would be calculated as if the retiree had worked until the age of sixty-five or had thirty years of service, whichever came first. On the date that Subsection (d4) became effective, Plaintiff had not achieved five years of creditable service. In November 2003, after twenty-two years of service, Plaintiff was disabled, retired, and his disability retirement allowance was calculated pursuant to Subsection (d4). Plaintiff argues that his disability retirement benefits should

have been calculated and paid in accordance with Subsection (d3) and not Subsection (d4). Accordingly, he seeks relief for himself and all others similarly situated. Plaintiff contends that he qualifies to receive benefits under Subsection (d3), at the date of employment, rather than at the date of vesting.

Plaintiff filed a Class Action Complaint in Wake County Superior Court in July 2007. Defendants filed a Motion to Dismiss Plaintiff's Class-Action Complaint Rule 12(b) in response. Following a hearing, the trial court granted Defendant's motion and entered an Order dismissing Plaintiff's complaint in March 2008. From this Order, Plaintiff appeals.

IMPAIRMENT OF CONTRACT

On appeal, Plaintiff argues that his Complaint stated a valid claim for relief from the State's violation of the Impairment of Contract Clause (Article 1.10, cl. 1 of the U.S. Const.) (Impairment Clause) of the United States Constitution. He asserts that this violation occurred when Subsection (d3) was repealed and replaced by Subsection (d4), thereby reducing his monthly disability retirement benefits.

Plaintiff maintains that the trial court based its Order on the premise that the Impairment of Contract Clause protects only a vested right. The Impairment of Contract Clause of Article 1, Section 10, Clause 1 of the United States Constitution, states that, "[n]o State shall enter into any Treaty, Alliance, or Confederation ... pass any Bill of

Attainder, ex post facto Law, or Law impairing the Obligation of Contracts...." Plaintiff further argues that the trial court's interpretation is incorrect because nowhere in the language of this clause is there any requirement for a "vested" right. Plaintiff relies on *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997) and *Bailey v. State of North Carolina*, 348 N.C. 130, 500 S.E.2d 54 (1998) to argue that the threshold question should be whether a contract has been impaired by the State. Plaintiff concludes that since neither *Faulkenbury, Bailey,* nor the language of the Impairment Clause protects only vested rights, the Order is incorrect. We disagree.

In determining whether or not there has been a violation of the Impairment Clause, we must apply a three step analysis. *See United States Trust Co. v. New Jersey,* 431 U.S. 1, 52 L.Ed.2d 92 (1977). This Court must determine: (1) if a contract exists at all; (2) if there is a contract, whether that contract was impaired, and; (3) whether the impairment was reasonable and necessary to serve an important public purpose. *Faulkenbury,* 345 N.C. at 690, 483 S.E .2d at 427. In the instant case, we do not reach steps two and three because we conclude that there is no contract under Subsection (d3).

Plaintiff argues that a member of the State's retirement system has a contractual right to the retirement benefits that existed at the time he accepted employment, rather than at the time his rights were vested. To support his argument, Plaintiff quotes directly from the Court's opinion in *Faulkenbury:*

> We believe that a better analysis is that at the time the plaintiffs started working for the state or local government, the statutes provided what the plaintiffs' compensation in the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract.

Faulkenbury, 345 N.C. at 690, 483 S.E.2d at 427. While the facts in *Faulkenbury* are similar to the present case, the plaintiffs in *Faulkenbury* had vested rights *prior* to changes in the method of calculating disability benefits. The Court states that:

> We believe that when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits *if those persons fulfilled the conditions.* When they did so, the contract was formed.

Id. at 691, 483 S.E.2d at 427 (emphasis added). This Court has held that, as a matter of law, that the retirement benefit contemplated by the statutes is effective at the time an employee's rights vest. It is only at the time an employee's rights have vested

that a contract is formed. The Court goes on further to explain that:

> [P]ursuant to the plaintiff's contracts, they were promised that if they worked for five years, they would receive certain benefits if they became disabled. The plaintiffs fulfilled this condition. At that time, the plaintiffs' rights to benefits in case they were disabled became vested. The defendants could not then reduce the benefits.

Id. at 692, 483 S.E.2d at 428. In the present case, however, Plaintiff had not completed five years of service at the time Subsection (d4) came into effect. Therefore, his rights had not yet vested and there was no contract under Subsection (d3). Rather, he had a contract under Subsection (d4), since Plaintiff completed five years of service at the time Subsection (d4) was in effect.

Plaintiff also selectively quotes from a passage in *Bailey* that states:

> "According to the cardinal principle of justice and fair dealings between government and man, as well as between man and man, the parties shall know prior to entering into a business relationship the conditions which shall govern that relationship."

Bailey, 348 N.C. at 149, 500 S.E.2d at 65 (quoting *Hickey v. Pension Bd.*, 378 Pa. 300, 309-10, 106 A.2d

233, 237-38 (1954)). However, reading further reveals that, "[p]laintiffs ... had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became *vested*." *Id.* at 141,500 S.E.2d at 60. The Supreme Court and this Court "have reaffirmed this central principle of *Simpson* in several subsequent cases." *Bailey*, 348 N.C. at 142, 500 S.E.2d at 60. *See e.g., Miracle v. N.C. Local Gov't Employees' Retirement System*, 124 N.C.App. 285, 290, 477 S.E.2d 204, 207 (1996) (applying the interpretation of "vested" used in *Simpson* and *Hogan* to pension terms); *Hogan v. City of Winston-Salem*, 121 N.C.App. 414, 419, 466S.E.2d 303, 306-07 (1966) (members of Retirement System required to have five or more years of creditable service prior to being eligible for retirement benefits); *Woodward v. Local Governmental Employees' Retirement System*, 108 N.C.App. 378, 424 S.E.2d 431 (1993)(plaintiff had five years of creditable service at time of his retirement, therefore was vested by the time statute was amended).

Plaintiff argues that a recent opinion issued by this Court, *Whisnant v. Teachers' and State Employees' Retirement System of North Carolina*, --- N.C.App. ----, 662 S.E.2d 573 (2008), was wrongly decided and that it conflicts with *Faulkenbury*, *Bailey*, and the Subsection (d3) statute. Plaintiff's argument is not compelling. *Whisnant* presents the same legal issues and analyses as in the case before us. The petitioner in *Whisnant* argued that he was entitled to receive employee benefits under the scheme that was in place when he began work. The trial court ruled that because petitioner was not

vested in the earlier plan, respondents were permitted to change the plan. *Id.* at ----, 662 S.E.2d at 574. After citing language from *Faulkenbury,* this Court concluded that "[i]t is clear ... that the terms of the contract are established at the time the benefits vest, *i.e.,* five years after petitioner began employment." *Id.* at ----, 662 S.E.2d at 575.

Plaintiff's claim that the Order violates the Impairment of Contract Clause is unfounded. Although we are guided by a three-part test from *United States Trust Co.,* our analysis ends at the first part of the test, determining whether a contract exists at all. It is clear that "[i]n the context of retirement benefits, a contractual obligation exists once the employee's rights have vested." *Schimmeck v. City of Winston-Salem,* 130 N.C.App. 471, 473, 502 S.E.2d 909, 911 (1998). Plaintiff does not have a valid Impairment of the Contract Clause argument because he did not have a contract under Subsection (d3).

We conclude that the trial court did not err in dismissing Plaintiff's class action complaint per N.C.R. Civ. P. 12(b)(6), failure to state a claim upon which relief can be granted. "Our concern ... [is] whether the complaint when liberally construed states a claim for this plaintiff in this case against this defendant upon which relief can be granted on any theory." *Benton v. W.H. Weaver Construction Co.,* 28 N.C.App. 91, 95, 220 S.E.2d 417, 420 (1975). There was no violation of the Impairment of the Contract Clause, G.S.. 128-28-7(d3), or G.S.. 128-27(d4). Accordingly, we hold that the trial court properly dismissed this claim.

For the foregoing reasons, we conclude that the trial court properly dismissed Plaintiff's claim and that its Order should be affirmed.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).

Entered March 9, 2008

STATE OF NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE
07 CVS 011806

CLAYTON LEE PROCTOR, Jr., on behalf of himself and all others similarly situated,

Plaintiff,

v.

LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE LOCAL GOVERNMENT EMPLOYEE'S RETIREMENT SYSTEM, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,

Defendants.

MEMORANDUM OF DECISION AND ORDER

THIS MATTER comes before the undersigned upon the Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The Court, having heard arguments of counsel and considered all matters of record, enters the following Memorandum of Decision and Order.

The facts alleged in the Plaintiff's complaint, which are deemed to be true for the purposes of consideration of this Motion to Dismiss, are the following. The Plaintiff is a disabled firefighter who began employment with the High Point Fire Department in April 1981. At the time Plaintiff commenced employment, North Carolina law provided local government employees certain disability retirement benefits as defined by N.C. Gen. Stat. § 128-27(d3) (1981) (hereinafter "D3"). D3 provided, in essence, that local government employees who became disabled after 5 years of service, and who retired on disability retirement after July 1, 1971, would receive a retirement allowance calculated as if the employee had attained age 65.

In 1982, N.C. Gen. Stat. § 128-27 was amended by the addition of 128-27(d4) (hereinafter "D4"). D4 provides, in essence, that a vested disabled retiree's monthly retirement allowance is to be calculated as if the retiree had worked to age 65 or achieved 30 years of service, whichever came first. As of the effective date of D4, Plaintiff had not yet attained 5 years of service, and was therefore not vested as of the effective date of D4.

Plaintiff became disabled and retired in November 2003 after 22 years of service. His disability retirement benefits have been calculated and paid in accordance with D4, and not D3. Plaintiff seeks relief for himself, and all others similarly situated, compelling the Defendants to pay disability retirement benefits in accordance with D3 rather than D4. Plaintiff contends that he is entitled to benefits provided by statute as of the date of employment, rather than the date of vesting.

Plaintiffs causes of action are each premised upon the existence of a contractual relationship between Plaintiff and Defendants. Specifically, Plaintiff alleges that the failure of the Defendants to pay benefits in accordance with D3 is an impairment of his contractual and property rights in violation of the contract clause and due process clause of the United States Constitution and the parallel provisions of the North Carolina Constitution. U.S. Const. Art. I § 10, c1.1, Amendments V and XIV; N.C. Const. Art. I, §§ 1 & 19. Plaintiff further alleges that Defendants have breached fiduciary duties arising out of their contractual relationship.

The threshold constitutional analysis for each of Plaintiff's causes of action is the same: the Court must first determine whether a contractual obligation existed between Plaintiff and Defendants at the time of the alleged impairment or deprivation of rights. *U.S. Trust Co. of1V.Y. v. New Jersey,* 431 U.S. 1, 52 L. Ed. 2d 92 (1977)(regarding U.S. Const. Art. 1 claims (contract clause)); *Lynch v. United States,* 292 U.S. 571, 78 L.Ed. 1434 (1934); *Bailey v.*

State of North Carolina, 348 N.C. 130 (1998)(regarding causes of action under Article V of the U.S. Constitution and Article I, §§ 1 and 19 of the N.C. Constitution, the Plaintiff must establish "property" in the form of a valid contract or enforceable contract rights). More specifically, the critical issue in this case is whether contractual rights to disability retirement benefits inure to public employees whose pensions have not yet vested. If, on the date of employment in 1981, Plaintiff acquired contractual rights to disability retirement benefits as those benefits were defined by statute at that time (i.e. D3), dismissal of this matter would be improper because further factual development of this case would be required to determine whether, in enacting D4, the State unconstitutionally impaired contractual rights of the Plaintiff. On the other hand, if Plaintiff acquired no contractual rights at the time of employment, but rather accrued contractual rights only at the time of vesting after five years of employment, the enactment of D4 prior to the date of vesting would not impair any legally recognized contractual or property rights of the Plaintiff, and Plaintiff's complaint would therefore not state a legally cognizable claim.

In *Simpson v. N.C. Local Government Employees Retirement System*, 88 N.C. App 218, 363 S.E.2d 90 (1987), the N.C. Court of Appeals examined the same statute at issue in this litigation, namely D4, as it applied to public employees who had already vested. Judge Wells, in his opinion for the Court, surveyed the various approaches employed by other jurisdictions, and concluded that

"the relationship between [public employees] and the Retirement System is one of contract." The opinion explained:

> 'A pension paid a governmental employee . . . is a deferred portion of compensation earned for services rendered.' If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. The agreement to defer the compensation is the contract. Fundamental fairness also dictates this result.

Id at 223, 363 S.E.2d at 94, citing *Insurance Co. v. Johnson, Comm 'r of Revenue*, 257 N.C. 367, 126 S.E.2d 92 (1962)(emphasis added).

However, simply acknowledging that the relationship is contractual does not resolve the issue. The critical issue in this case is when do the contractual rights of the employee become legally enforceable and constitutionally protected from impairment by the State? Our appellate courts have not yet been provided an opportunity to rule on the precise issue raised in this case, namely where benefits existing at the time of employment were alleged to have been diminished by state action prior to the date of vesting.

A survey of other jurisdictions which have addressed this issue yields varying results. A

diminishing minority of jurisdictions hold that public employee pension benefit plans are not contractual, but are gratuities which can be modified by the State at any time. *Simpson, supra*, 88 N.C. App. 218, 223. Of the jurisdictions which, like North Carolina, hold that benefit plans are contractual in nature, some have held that pension rights vest unconditionally at the moment of employment. *See, e.g. Smith v. City of Dothan,* 279 Ala. 571, 188 So.2d 532 (1966). Others have held that pension rights, although contractual, may be modified by the legislature where necessary and reasonable, provided that any disadvantages to employees are offset by comparable new advantages (the "California rule"). *See, e.g. Maffei v. Sacramento Co. Employees' Retirement System,,* 103 Cal. App. 4th 993, 127 Cal. Rptr. 2d 279 (3d Dist. 2002). If either of these latter two rules were applied to this case, the Defendants' motion to dismiss would be denied. It appears, however, that North Carolina appellate courts, while not yet having confronted the circumstances of this case directly, have adopted, in *dicta,* another alternative. The North Carolina rule appears to be that public employees have a contractual right to rely on the terms of the retirement plan as those terms existed at the moment their retirement rights became vested, but not before.

This *dicta* was first stated by the *Simpson* Court, which said:

> [a] public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and

> continually promised him over many years, will not be removed or diminished. Plaintiffs . . . had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.

Simpson, 88 N.C. App. at 224, 363 S.E.2d at 94 (emphasis added). Several years later, the Court of Appeals, in *dicta in Wells v. Consolidated Judicial Retirement Sys.*, 136 N.C. App. 671, 673, 526 S.E.2d 486 (2000), clearly enunciated the relationship between vesting and formation of a contractual relationship. The Court said:

> The relationship between State employees and the Retirement System is contractual in nature. *Simpson v. N.C. Local Gov't Employees' Retirement System*, 88 N.C. App. 218, 223, 363 S.E.2d 90, 93 (1987), *aff'd*, 323 N.C. 362, 372 S.E.2d 559 (1988). In North Carolina, contractual rights vest in the Retirement System after five years of membership. N.C. Gen. Stat. § 13557(c) (1997). The contract is embodied in state statute and governed by statutory provisions as they existed at the time the employee's contractual rights vested. *Id.* at 224, 363 S.E.2d at 94. "[Members of the Retirement System] had a contractual right to rely on the terms of the retirement plan as these

> terms existed at the moment their retirement rights became vested." *Id.*
>
> Plaintiff became a member of the ORS in August of 1979. Therefore, his right to retirement benefits vested in August of 1984. At that time, the relationship between plaintiff and the Retirement System became contractual in nature. Said contract was governed by the provisions of Chapter 135 as they existed in 1984.

Based upon the consistent and unambiguous *dicta* of these appellate opinions, this Court now concludes that until a public employee has vested after five years of creditable service, his or her rights to retirement benefits are inchoate, and may be diminished by subsequent legislation. *See, Bowen v. Board of Trustees,* 76 So. 2d 430, 436-435 (La. Ct. App. 1954); *Teachers' Tenure Act Cases,* 329 Pa. 213, 197 A. 344 (1938). "'Inchoate' rights . . . may be taken away by statute before their attempted exercise, although, when exercised before the statutory withdrawal, the resulting estate is a vested right which cannot be retroactively affected." *Pinkham v. Unborn Children of Jather Pinkham,* 227 N.C. 72 (N.C. 1946).

An inchoate right is not sufficient to support a claim of impairment under the United States or North Carolina constitutions. "[i]t would seem that a right cannot be considered a vested right [for the purposes of constitutional analysis] unless it is something more than such a mere expectancy as

may be based upon an anticipated continuance of the present general law; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption for a demand made by another." *Cooley's Constitutional Limitations,* Vol. 2, p. 749 (5th ed. 1998).

Applying this analysis to the case at hand, because the Plaintiff's benefits had not vested as of the date that the General Assembly amended the local government employee's disability retirement benefits by adding D4, his rights on that date were merely inchoate, and not yet contractual. Until the date of vesting, the General Assembly was free to change the benefits, as it did by adding D4. No contractual rights or property rights of the Plaintiff were impaired, because the promised benefits were mere expectancies, and had not yet attained the status of vested property rights. Hence, the Plaintiff's causes of action, all of which are premised upon the existence of either contractual rights or property rights, must be DISMISSED pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

So ordered, this the 9th day of March, 2008.

/s/ Paul C. Ridgeway
Paul C. Ridgeway
Superior Court Judge

N.C. G.S.A. 7A-30

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals

Except as provided in G.S. 7A-28, an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case:

(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or

(2) In which there is a dissent.

N.C. R. App. P. 14

Rule 14. Appeals of Right From Court of Appeals to Supreme Court Under N.C.G.S. § 7A-30

(a) Notice of Appeal; Filing and Service. Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the clerk of the Court of Appeals and with the clerk of the Supreme Court and serving notice of appeal upon all other parties within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chair of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) Content of Notice of Appeal.

...

(2) *Appeal Presenting Constitutional Question.* In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

Entered June 1, 2009

NO. COA08-976

NORTH CAROLINA COURT OF APPEALS

CLAYTON LEE PROCTOR, Jr., on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE LOCAL GOVERNMENT EMPLOYEE'S RETIREMENT SYSTEM, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,

Defendants-Appellees.

From Wake County
No. 07 CVS 11806

APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS APPEAL

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Appellant Proctor in his *Notice of Appeal to the Supreme Court of North Carolina Under N.C. Gen. Stat. § 7A-30* (*"the Notice of Appeal"*) states: "The constitutional question arising under the Contract Clause which is presented in this appeal is substantial for at least 10 reasons."[1] Defendants in their *Motion to Dismiss Appeal* (the *"Motion"*) did even not address 8 of the 10 reasons why this appeal presents a substantial constitutional question.[2] Appellees refusal to suit up on the field of reason to engage 8 of the 10 reasons why this Contract Clause appeal is substantial is, no doubt, because Appellees could not demonstrate why any of those 8 unaddressed reasons do not present a substantial Contract Clause question.[3]

Appellees, nonetheless, assert: "Plaintiff's contention that he has a contractual right to the terms of the statute in place when he began employment has no support in North Carolina law, and has been specifically rejected by the appellate courts of this State."[4] Appellee's assertions are either demonstrably false or half-truths.

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[1] *Notice of Appeal*, p. 7.

[2] *Motion*, pp. 1-9.

[3] The unaddressed 8 reasons are delineated in the Notice of Appeal, pp. 7-10.

[4] *Motion*, p. 4. (emphasis added).

The Contract Clause question which is the subject of this appeal is:

> Whether the *Class Action Complaint* states a valid claim for relief by alleging: the State violated the Impairment of Contract Clause (Article 1 § 10, cl. 1 of the U.S. Const.), by repealing N.C. Gen. Stat. § 128-27(d3)(1981)(the disability retirement benefit statute in place in the Retirement Plan at the time Mr. Proctor's employment and his monthly contributions to the Plan began) and replacing that statute with another disability retirement benefit statute, N.C. Gen. Stat. § 128-27(d4)(1982), thereby substantially reducing his monthly disability retirement benefit?[5]

Appellees' assertion that the question presented in this appeal has been **"specifically rejected by the appellate courts of this State"**[6] is at best a half-truth. The substantial Contract Clause question presented in this appeal has never been specifically addressed by this Court. This Court did decline "discretionary review" in a case which involved a structurally similar issue,

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[5] *Notice of Appeal*, p.10.

[6] *Motion*, p. 4. (emphasis added).

Whisnant v. Teachers' & State Employees' Ret. Sys.[7] However, it is self-evident that the denial of discretionary review is not a "**conclusive** judicial determination."

State v. Colson[8] is the seminal Supreme Court of North Carolina involving an analysis of N.C. Gen. Stat. § 7A-30(1). Colson states: "The question [presented in the appeal under § 7A- 30(1)] must be real and substantial ... . [and] a **constitutional question** which has **not** already been the subject of **conclusive** judicial determination."[9] In *Thompson v. Thompson*,[10] in contradistinction to this appeal, **this Court** dismissed an appeal under § 7A- 30(1) because this Court previously "considered and answered [the question presented in the appeal] in the negative ... ."[11] Similarly, in *State v. Arrington*[12] this Court observed: Whether rights guaranteed by the Constitution of North Carolina have been provided and the proper tests to be used in resolving

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[7] *Whisnant v. Teachers' & State Employees' Ret. Sys.*, ___ N.C.App. __, 662 S.E.2d 573, *disc. rev. denied*, No. 355P08 (N.C. Oct. 9, 2008), *cert. denied*, 129 S. Ct. 1370, 173 L. Ed 2d 591 (2009).

[8] *State v. Colson*, 274 N.C. 295, 163 S.E.2d 2d 376 (1968).

[9] *Id.*, 274 N.C. at 300-301, 163 S.E.2d at 380. (Emphasis added).

[10] *Thompson v. Thompson*, 288 N.C. 120, 215 S.E.2d 606 (1975. (Emphasis added).

[11] *Id.*, 288 N.C. at 121, 215 S.E.2d at 607.

[12] *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984).

such issues are questions which can only be answered with **finality** by this Court.[13]

Appellees in their *Motion* invoke *Simpson*,[14] *Faulkenbury*[15] and *Bailey*[16]:

> *Simpson* [held] that ... the plaintiffs ... "had a contractual right to rely on the terms of the retirement plan *as these terms existed at the moment their retirement rights became vested.*" *Id.* at 224, 363 S.E.2d at 94 (emphasis added).
>
> *Faulkenbury* held: "The plaintiffs expected to receive what they were promised *at the time of vesting.*" *Faulkenbury*, 345 N.C. at 692, 483 S.E.2d at 428 (emphasis added)... . *Bailey* held the plaintiffs ... "'had *a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.*'" Bailey, 348 N.C. at 141, 500 S.E.2d at 60 (quoting *Simpson*) (emphasis in original).

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[13] *Id.*, 311 N.C. at 643, 319 S.E.2d at 260. (Emphasis added).

[14] *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 88 N.C.App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988).

[15] *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997).

[16] *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998).

Appellees are, in essence, merely repeating what they wrongly stated in their *Brief* to the Court of Appeals: "*Faulkenbury*, *Bailey*, as well as *Whisnant* and numerous other decisions which have addressed the issue have held that a governmental employee's rights to retirement benefits become contractually enforceable and constitutionally protected only after the employee becomes vested in those benefits."[17] Appellee's assertion is patently false. The term "only" nowhere appears in either the holding or the dicta of either *Simpson*, *Faulkenbury* and *Bailey*. The Appellees have, in effect, once again misrepresented the logical operation of the term "if" and the logical operation of the term "if and only if." Those two terms are not synonymous.[18] "The connective expression 'only if' causes a good deal of confusion."[19]

Simpson held that if the public employee has served 5 years and, therefore, vested in the plan, then the employee has a right to rely on the terms of the plan as those terms then existed. "[North Carolina's public employees have a] right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested."[20] *Simpson* **did not hold** that North

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[17] *Defendants'-Appellee's* [Proctor Court of Appeals] *Brief* at p. 7. (Emphasis in original).

[18] Rodes & Posposel, *Premises and Conclusions: Symbolic Logic for Legal Analysis* (Prentice Hall: 1997) pp. 30-35. (Appendix A).

[19] *Rodes & Posposel, Premises and conclusions*, p. 32.

[20] *Simpson*, 88 N.C.App. at 224, 363 S.E.2d at 94.

Carolina's public employees have a right to rely on the terms of the retirement plan **if and only if** they have served 5 years and are, therefore, vested in the plan. As a matter of elementary logic, the second sentence does not follow from the first sentence. Although North Carolina's public employees do have a right to rely on the terms of the retirement plans as these terms existed at the moment their retirement plans became vested, it does not logically follow that North Carolina's public employees **only** have a right to rely on the terms of the plan **if and only if** they have served 5 years and, therefore, are vested in the plan. Nor did either *Faulkenbury* or *Bailey* so hold. Indeed, *Faulkenbury* repeatedly states that the retirement statutes are "offers" which the public employees "accept" upon employment[21] and *Bailey* embraces the "cardinal principle of justice" that a person knows the terms of the contract prior to entering into a business arrangement.[22] *Simpson* is consistent with *Faulkenbury* and *Bailey*: the "agreement to defer the compensation is the contract,"[23] thereby entailing that the Retirement Plan agreement is formed upon employment — not five years after employment — since Mr. Proctor deferred 6% of his salary each month to the Plan's pension fund.[24]

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[21] Mr. Proctor's Court of Appeals *Brief*, p. 20; Mr. Proctor's Court of Appeals *Reply Brief*, p. 4.

[22] Mr. Proctor's Court of Appeals *Brief*, p. 21.

[23] *Simpson*, 88 N.C.App. at 224, 363 S.E.2d at 94.

[24] N.C. Gen. Stat. §§ 128-30(b)(1)&(2) and (g)(1).

Hence, this appeal presents a substantial Contract Clause question which has not been specifically addressed by this Court. Appellees' *Motion* has gerrymandered Simpson, *Faulkenbury* and *Bailey* and should be denied.

Respectfully submitted, this the 1st day of June, 2009.

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Filed May 27, 2009

NO. 193A09

SUPREME COURT OF NORTH CAROLINA
TENTH DISTRICT

CLAYTON LEE PROCTOR, Jr., on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE LOCAL GOVERNMENT EMPLOYEE'S RETIREMENT SYSTEM, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,

Defendants-Appellees.

From Wake County
COA08-976

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MOTION TO DISMISS APPEAL
(N.C.G.S. § 7A-30)

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TO: THE HONORABLE SUPREME COURT OF NORTH CAROLINA

NOW COME defendants, by and through the undersigned counsel, and respectfully move this Court to dismiss the appeal filed by plaintiff on or about 8 May 2009, pursuant to Rules 14 and 37 of the North Carolina Rules of Appellate Procedure. Defendants submit that plaintiff has failed to show that the cause directly involves substantial questions arising under the United States or North Carolina Constitutions. See N.C.G.S. § 7A-30(1).

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff became regularly employed with the City of High Point Fire Department, and thereby became a contributing member of the Local Governmental Employees' Retirement System ("LGERS" or "Retirement System"), in April 1981. (R p. 22) He worked for the Fire Department until he incurred an injury in 2003. As a result of this injury, plaintiff applied and was approved for disability retirement pursuant to N.C.G.S. § 128-27(c), effective November 2003. *Id.* Since that time, he has been receiving disability retirement benefits calculated pursuant to N.C.G.S. § 128-27(d4), which provides as follows:

> Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982.
>
> -- Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

N.C.G.S. § 128-27(d4).

On 25 July 2007, plaintiff filed his class action complaint in Wake County Superior Court. Plaintiff claimed that he was entitled to have his disability retirement benefits calculated pursuant to N.C.G.S. § 128-27(d3), the statute in effect when he first began employment in April 1981. Under (d3), a member who was approved for disability retirement was entitled to a benefit similar to that provided for in (d4), except that the formula utilized the creditable service he [the member] would have had at the age of 65 years if he had continued in service." The legislature replaced the benefit calculation in

(d3) with (d4) effective 1 July 1982, just over a year after plaintiff's employment began. Plaintiff claimed that he had a contractual right to the (d3) benefit formula, which right he claimed had been unconstitutionally impaired by the application to him of paragraph (d4).

Defendants moved to dismiss for failure to state a claim, which motion was granted by the Honorable Paul C. Ridgeway. (R p. 54) On 7 April 2009, the Court of Appeals unanimously upheld Judge Ridgeway's order of dismissal, relying principally upon this Court's decisions in *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997) and *Bailey v. State,* 348 N.C. 130, 500 S.E.2d 54 (1998) .

NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS RAISED

In order to be able to appeal to this Court as of right under N.C.G.S. § 7A-30(1), a plaintiff must show that the constitutional question is real and substantial rather than superficial and frivolous; *and* it must be a constitutional question that has not already been the subject of conclusive judicial determination. *State v. Colson,* 274 N.C. 295, 163 S.E.2d 376 (1968), *cert. denied,* 393 U.S. 1087, 21 L. Ed. 2d 780 (1969). If a plaintiff cannot make such showing, the appeal must be dismissed. *Thompson v. Thompson,* 288 N.C. 120, 215 S.E.2d 606 (1975). As set out more fully below, the key constitutional issue in this case is well settled in North Carolina, to wit, employees who participate in one of the State-administered retirement systems obtain enforceable,

contractual rights to their retirement benefits at the time they become vested. Plaintiff's contention that he has a contractual right to the terms of the statute in place when he began employment has no support in any North Carolina case law, and has been specifically rejected by the appellate courts of this State.

Plaintiff admits that he did not become vested until 1986, some four years after the legislature had replaced (d3), but he challenges the Court of Appeals' conclusion that he did not have a contractual right to a particular benefit calculation until he became vested. Plaintiff asserts that the Court of Appeals was in error because its holding is contrary to certain principles of contract law and to case law from other jurisdictions.

The Court of Appeals properly analyzed plaintiff's Impairment of Contract Clause claim by determining, first, whether plaintiff had a contract with respect to (d3) benefits, citing the three step analysis set forth in *United* States *Trust Co. v. New Jersey,* 431 U.S. 1, 52 L. Ed. 2d 92, 97 S. Ct. 1505 (1977). Relying on *Faulkenbury, Bailey* and the numerous decisions cited within those cases, the court held that plaintiff's contract with respect to his retirement benefits was formed at the time he became vested, rather than when he was hired. This conclusion is fully in accord with every North Carolina appellate court decision on the matter. *See,* e.g., *Hogan v. City of Winston-Salem,* 121 N.C. App. 414, 466 S.E.2d 303 (pension term in effect when plaintiff vested deemed contractual, and alteration after plaintiff's injury deemed subject to impairment

analysis), *aff'd per curiam*, 344 N.C. 728, 477 S.E.2d 150 (1996); *Wells v. Consolidated Judicial Retirement* Sys., 136 N.C. App. 671, 673, 526 S.E.2d 486 (2000) ("contract is embodied in state statute and governed by statutory provisions as they existed at the time the employee's contractual rights vested"), *aff'd*, 354 N.C. 313, 553 S.E.2d 877 (2001); *Tripp v. City of Winston-Salem*, 188 N.C. App. 577, 583, 655 S.E.2d 890, 894 (2008) ("contract between plaintiff and the City with respect to plaintiff's retirement benefits was formed when plaintiff became vested").

Plaintiff argues that the decision is contrary to decisions of other jurisdictions. The fact that different state courts have come to different conclusions on the issue was recognized in *Simpson v. N.C. Local Gov't. Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988), the case acknowledged in *Bailey* as "the most pertinent North Carolina case on this subject." *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60. (See also *Parker v. Wakelin*, 123 F.3d 1 (1st Cir. 1997), *cert. denied*, 140 L. Ed. 2d 813, 118 S. Ct. 1675 (1998) for a detailed analysis of the varying approaches taken in different jurisdictions.) The *Simpson* panel analyzed numerous different approaches which courts in other jurisdictions had taken regarding the pension rights of public employees, noting that "[s]ome . . . states have held that such pension rights vest unconditionally at the moment of employment[,]" *Simpson*, 88 N.C. App. at 222, 363 S.E.2d at 93, the very position now espoused by plaintiff. *Simpson* went on to hold that the relationship between the

LGERS and employees who have vested in that system is contractual in nature, and that the plaintiffs in that case "had a contractual right to rely on the terms of the retirement plan *as these terms existed at the moment* their *retirement rights became vested.*" *Id.* at 224, 363 S.E.2d at 94 (emphasis added).

This holding was reconfirmed by this Court in *Faulkenbury*. "The plaintiffs expected to receive what they were promised at the *time of vesting.*" *Faulkenbury*, 345 N.C. at 692, 483 S.E.2d at 428 (emphasis added). In ruling on the claims of government employees to a tax-free pension, this Court provided even further analysis as to when a contractual obligation arises between the State and its employees, concluding that the plaintiffs in that case "'had a *contractual right to rely on the terms of the retirement plan as these terms existed* at *the moment their retirement rights became vested.*'" *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (quoting Simpson)(emphasis in original).

This Court declined review of this precise issue most recently in the case of *Whisnant v. Teachers' & State Emples. Ret. Sys.*, N.C. App., 662 S.E.2d 573, *disc. rev, denied*, No. 355P08 (N.C. Oct. 9, 2008), *cert. denied*, 129 S. Ct. 1370, 173 L. Ed. 2d 591 (2009). In *Whisnant*, the petitioner claimed that the statutory amendments to the Teachers' and State Employees' Retirement System, enacted after he was hired but before he vested, constituted an impairment of contract with the State. The *Whisnant* panel held that "Ib3ecause petitioner's benefits did not vest prior to the time

that the legislature altered the statutory benefit scheme, he failed to state any complaint upon which relief could be granted." *Id.* at 575.

The Court of Appeals correctly applied the holdings of *Faulkenbury, Bailey,* and *Simpson* in upholding the dismissal of plaintiff's claim. Plaintiff did not have a contractual right to disability retirement benefits under N.C.G.S. § 128-27(d3) because he was not yet vested when the legislature replaced that statute. Because he did not have a contract, plaintiff has no legal basis to support his impairment of contract claim.

WHEREFORE, defendants respectfully request that this Court dismiss plaintiff's appeal based on the absence of any substantial question arising under the Constitution of the United States or of this State.

This the 27th day of May, 2009.

Roy Cooper
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Entered May 8, 2009

NO. COA08-976

SUPREME COURT OF NORTH CAROLINA

CLAYTON LEE PROCTOR, Jr., on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE LOCAL GOVERNMENT EMPLOYEE'S RETIREMENT SYSTEM, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,

Defendants-Appellees.

From Wake County
No. 07 CVS 11806

NOTICE OF APPEAL TO THE SUPREME COURT OF NORTH CAROLINA UNDER N.C. Gen. Stat. § 7A-30 & N.C. App. Rules 14(a)&(b)(2)

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Appellant Clayton Lee Proctor, Jr., pursuant to N.C. Gen. Stat. § 7A-30 and N.C. App. Rules 14(a)&(b)(2), hereby appeals to the Supreme Court of North Carolina from an unpublished opinion of the North Carolina Court of Appeals (decided without the benefit of oral argument) entitled *Proctor v. Local Government Employees' Retirement System* filed on 7 April 2009 (*"Proctor"*). The *Proctor Slip Opinion* (*"Opinion"*) is attached as Exhibit A.

This appeal involves a substantial constitutional question arising under the Impairment of Contract Clause of Article I Section 10 of the *Constitution of the United States* ("Contract Clause") which provides: "No State shall ... pass any ... Law impairing the Obligations of Contracts." The trial court dismissed the *Class Action Complaint* "under N.C.R. Civ. [R] 12(b)(6) for failure to state a claim upon which relief can be granted."[1] The North Carolina Court of Appeals held that "the trial court properly dismissed this claim."[2] The facts are undisputed.

In 1981 when Mr. Proctor began employment as a firefighter, certain statutes contained within the *Retirement System for Counties, Cities and Towns*, N.C. Gen. Stat. §§ 128-21 thru 128-38(1981)("the Retirement Plan") were in effect. The Retirement Plan's statutes in place then included G.S. §§ 128-

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[1] *Opinion* at 1 - 2.

[2] *Id.* at 9.

27(c) & (d3)(1981)[3] which, when read together, provide: an employee who becomes disabled after 5 years of creditable service and who retires on disability on or after 1 July 1971 shall receive a retirement allowance calculated as if the employee had worked to age 65.[4]

Effective 1 July 1982, the legislature amended G.S. § 128-27(d3)(1981) so that the statute (now G.S. § 128-27(d3)(1982)) applied only to employees who became disabled before 1 July 1982. The legislature also enacted, effective the same date, a new disability retirement statute, G.S. § 128-27(d4)(1982). G.S. § 128-27(d4)(1982) essentially replaced G.S. § 128-27(d3)(1981).[5] G.S. § 128-27(d4)(1982), when read in conjunction with G.S. § 128-27(c)[6], provides: an employee who becomes disabled after 5 years of creditable service and who retires on disability on or after 1 July 1982 shall receive a retirement allowance calculated as if the employee had worked to age 65 or obtained 30 years of service, whichever comes first.[7]

Mr. Proctor neither became disabled nor achieved 5 years of creditable service before 1 July

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[3] The Subsections of the Retirement Plan at issue in this Appeal are in bold type for the purpose of assisting the Court.

[4] *Opinion* at 3.

[5] *Id.*

[6] G.S. § 128-27(c)(1981) did not materially change in 1982 or thereafter.

[7] *Opinion* at 3.

1982 (the effective date of the amendment to G.S. § 128-27(d3)(1981), which then became G.S. § 128-27(d3)(1982), and the enactment of G.S. § 128-27(d4)(1982).[8] Mr. Proctor, therefore, did not have the 5 years of service necessary for his right to benefits to vest in the Retirement Plan prior to the effective dates of G.S. § 128-27(d3)(1982) and G.S. § 128-27 (d4)(1982). In sum, the material difference between G.S. § 128-27(d3)(1981) and G.S. § 128-27(d4)(1982) for Mr. Proctor and the putative Class Members is the calculation of their disability retirement benefits based upon a projection of service to age 65 rather than a projection of service to 30 years.

Mr. Proctor became disabled and qualified for disability retirement in "November 2003, after twenty-two years of service.. ."[9] He has been paid a monthly disability retirement benefit in accordance with G.S. § 128-27(d4)(1982) (the statute on the books when he became disabled) rather than G.S. § 128-27(d3)(1981) (the statute on the books when he began employment). The *Class Action Complaint* asserts, in essence, that the legislative disability retirement formula change from G.S. § 128-27(d3)(1981) to G.S. § 128-27(d3)(1982) and G.S. § 128-27(d4)(1982) violates the Contract Clause.[10]

The *Opinion* consists of four essential components: [1] the observation that North Carolina

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[8] *Id.*

[9] *Opinion* at 4.

[10] *Id.*

courts "must apply a [Contract Clause] three step analysis [provided in] ... *United States Trust Co. v. New Jersey*"[11] which Mr. Proctor acknowledges; [2] two factual premises acknowledged by Mr. Proctor; [3] three controverted legal conclusions; and [4] two controverted holdings.

[1] The *Opinion* states that first step of *United States Trust* is to determine "if a contract exists ... ."[12] Mr. Proctor agrees with the *Opinion* that *United States Trust* is applicable and that the first step is to determine whether a contract exists between him and the North Carolina Local Governmental Employees' Retirement System ("the Retirement System").

[2] Mr. Proctor acknowledges the truth of the *Opinion*'s two factual premises: he "had not completed five years of service at the time Subsection (d4) came into effect"[13] and "his rights had not yet vested [in the Retirement Plan before the effective date of Subsection (d4)]."[14]

[3] The *Opinion*'s three controverted legal conclusions state: "It is only at the time an employee's rights have vested that a contract is formed,"[15] and "Plaintiff [Mr. Proctor] does not have

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[11] 431 U.S. 1, 52 L. Ed. 2d 92.

[12] *Opinion* at 5.

[13] *Opinion* at 7.

[14] *Id.*

[15] *Id.* at 6.

a valid impairment of the Contract Clause argument because he did not have a contract under Subsection (d3)[1981]."[16]

[4] The *Opinion*'s controverted holdings state: "[W]e hold that the trial court properly dismissed this claim."[17] [and] "its Order should be affirmed."[18]

This appeal, in accordance with N.C. Gen. Stat. § 7A-30 and N.C. App. Rules 14(a)&(b)(2), involves a substantial constitutional question arising under the Contract Clause: Whether the *Class Action Complaint* states a valid claim for relief by alleging: the State violated the Contract Clause by repealing N.C. Gen. Stat. § 128-27(d3)(1981)(the disability retirement benefit statute in place in the Retirement Plan at the time Mr. Proctor's employment and his monthly contributions to the Plan began) and replacing that statute with another disability retirement benefit statute, N.C. Gen. Stat. § 128-27(d4)(1982), thereby substantially reducing his monthly disability retirement benefit?

The constitutional question arising under the Contract Clause which is presented in this appeal is substantial for at least 10 reasons: [1] The United States Supreme Court, contrary to the *Opinion*, has never held that possession of a "vested right" is a necessary condition for a valid Contract Clause

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[16] *Id.* at 9.

[17] *Id.*

[18] *Id.*

claim;[19] [2] A host of other jurisdictions have held, contrary to the *Opinion*, that public employees who did not have "vested rights" in their respective state retirement plans do have valid claims under the Contract Clause;[20] [3] The *Opinion* (in analyzing whether Mr. Proctor has a G.S. § 128-27(d3)(1981) contract with the Retirement System) is contrary to applicable North Carolina contract law established

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[19] Mr. Proctor's Court of Appeals *Plaintiff-Appellants's Reply Brief* ("*Reply Brief*") pp. 9 - 11.

[20] *Yeazell v. Copins*, 402 P.2d 541 (Ariz. 1965)(the right to a pension attaches upon employment); *Weaver v. Evans*, 495 P.2d 639 (Wash. 1972)(("There are cases which hold that, since the right to receive a pension does not arise until all the conditions are fulfilled, the employee's rights must depend upon the law as it exists at that time. This view is unsupportable."); *Sylvestre v. State*, 214 N.W.2d 658, 666-67 (Minn. 1973)(public employees' contractual rights attach upon employment); *Miles v. Tennessee Consol. Ret. Sys.*, 548 S.W.2d 299, 306 (Tenn. 1977)(Contract Clause protection attaches at the onset of employment); *Public Employees' Ret. Bd. v. Washoe County*, 615 P.2d 972, 974 (Nev. 1980)(by "rendering services and making contributions [to the retirement fund], [a [public] employee acquires a limited vested right to pension benefits which may not be eliminated or substantially changed by unilateral action of the governmental employer to the detriment of the member"); and *State of Nevada Employees Assoc. v. Keating*, 903 F.2d 1223, 1227 (9th Cir. 1990)("non-vested [public] employees have contractual rights in pension plans, subject to reasonable modification").

in 1922 in *Roberts v. Mays Mills, Inc.*;[21] [4] The *Opinion* is contrary to North Carolina's seminal Contract Clause case involving disabled North Carolina public employees, *Simpson*,[22] which states that the "agreement to defer the compensation is the contract;"[23] thereby entailing that the Retirement Plan agreement is formed upon employment — not five years after employment; [5] The *Opinion* ignores the pivotal fact that (under the statutory terms of the Retirement Plan) Mr. Proctor and putative Class Members contributed 6% of their salaries to the Plan's pension fund;[24] [6] the *Opinion* fails to grasp

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[21] 184 N.C. 405, 114 S.E. 530 (1922)("It has become a very general policy with large employees of labor to offer a bonus or additional compensation to employees who shall render continuous and efficient service for a specified period of time. This is not a gratuity, or gift, on the part of the employer, with whom the offer originates in order to procure efficient and faithful service and continuous employment, and when the employee enters upon the service upon that inducement it becomes a supplementary contract of which he cannot be deprived without sufficient cause."); *Accord Hamilton v. Memorex Telex Corp.*, 118 N.C.App. 1, 454 S.E.2d 278 (1995)("As our Supreme Court established in *Roberts v. Mays Mills*, ..., when an employer represents to an employee that he will receive a benefit after working a certain period of time, the employee may accept by entering or maintaining employment, and the employer cannot thereafter disavow the promise once the employee has started to work on reliance thereon. It matters not that the benefit is earned in the present but to be enjoyed in the future.").

[22] *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 88 N.C.App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988).

[23] *Simpson*, 88 N.C.App. at 224, 363 S.E.2d at 94.

[24] G.S. §§ 128-30(b)(1)&(2) and (g)(1).

the difference between the logic of the terms "if" and "only if;"[25] [7] the *Opinion* violates the "four corners" contract principle restraining courts from adding terms to an instrument, the Retirement Plan, by essentially adding "vesting" as a precondition to the activation of the Plan's terms;[26] [8] The *Opinion* misreads *Faulkenbury* as a result of tripping over the ambiguity of a pronoun;[27] [9] the *Opinion* contradicts several core and repeated legal principles specified in *Faulkenbury*[28] that the retirement statutes are offers which the public employees accept upon employment[29] and *Bailey*[30] which embraces the "cardinal principle of justice" that a person knows the terms of the contract prior to entering into a business arrangement;[31] and [10] The *Opinion*'s interpretation of the Retirement Plan entails an absurd consequence: Mr. Proctor and putative Class Members contribute monthly 6% of their salaries to the Plan and, then, 5 years later (when their right to benefits vest in the Plan) the contractual terms of their Plan retirement benefits are set and revealed for the first time, whereupon a contract arises!

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[25] *Reply Brief* pp. 12 - 13.

[26] *Reply Brief* pp. 3 - 5.

[27] Mr. Proctor's Court of Appeals *Plaintiff-Appellants's Brief* ("*Brief*") pp. 26 - 28.

[28] *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997).

[29] *Brief* p. 20; *Reply Brief* p. 4.

[30] *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998).

[31] *Brief* p. 21.

In the event the Court finds the presented Contract Clause constitutional question to be substantial, thereby extending the courtesy and respect to meet Mr. Proctor on the field of reason, the following issues will be presented in his *Brief* for review:

1. Whether the *Class Action Complaint* states a valid claim for relief by alleging: the State violated the Impairment of Contract Clause (Article 1 § 10, cl. 1 of the U.S. Const.), by repealing N.C. Gen. Stat. § 128-27(d3)(1981)(the disability retirement benefit statute in place in the Retirement Plan at the time Mr. Proctor's employment and his monthly contributions to the Plan began) and replacing that statute with another disability retirement benefit statute, N.C. Gen. Stat. § 128-27(d4)(1982), thereby substantially reducing his monthly disability retirement benefit?

2. Whether the trial court erred by dismissing the *Class Action Complaint* for failure to state a claim for relief pursuant to Rule 12(b)(6)?

3. Whether the *Opinion* erred in holding that the trial court properly dismissed the Contract Clause claim and that the Order should be affirmed?

The undersigned counsel warrants to the Supreme Court of North Carolina that the Contract Clause constitutional issue presented in this appeal to the Supreme Court of North Carolina was timely raised in both the Wake County Superior Court and the North Carolina Court of Appeals, as may be verified by a review of the Mr. Proctor's Court of Appeals *Briefs*, the *Retirement System's Court of*

Appeals Brief, the *Opinion* and the *Record on Appeal*.

Respectfully submitted, this the 8th day of May, 2009.

SCHILLER & SCHILLER, PLLC

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/s/ David G. Schiller
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Filed April 7, 2008

STATE OF NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE
07 CVS 011806

CLAYTON LEE PROCTOR, Jr., on behalf of himself and all others similarly situated,

Plaintiff,

v.

LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE LOCAL GOVERNMENT EMPLOYEE'S RETIREMENT SYSTEM, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,

Defendants.

NOTICE OF APPEAL

TO: THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Plaintiff Clayton Lee Proctor, Jr., pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, hereby gives Notice of Appeal to the North Carolina Court of Appeals from the *Memorandum of Decision and Order* signed on March 9, 2008 and filed on March 10, 2008, by Judge Paul C. Ridgeway, which is attached hereto as **Exhibit A** and is incorporated by reference.

Respectfully submitted, this the 7th day of April, 2008.

SCHILLER & SCHILLER, PLLC

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Filed August 29, 2007

STATE OF NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE
07 CVS 011806

CLAYTON LEE PROCTOR, Jr., on behalf of himself and all others similarly situated,

Plaintiff,

v.

LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE LOCAL GOVERNMENT EMPLOYEE'S RETIREMENT SYSTEM, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,

Defendants.

MOTION TO DISMISS PLAINTIFF'S CLASS-ACTION COMPLAINT
Rule 12b

NOW COME Defendants, by and through their undersigned counsel, and hereby file this Motion to Dismiss, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and show the Court::

1. Plaintiff's complaint alleges the following pertinent facts:

a. he first became employed with the City of High Point Fire Department, and became a contributing member of the Local Governmental Employees' Retirement System ("LGERS"), in April 1981;

b. he worked continuously until around November 2003, accruing about 22 years of creditable service in the LGERS; and

c. as a result of an injury, Plaintiff applied for and began receiving disability retirement benefits pursuant to N.C.G.S. §§ 128-27(c) and 128-27(d4) in November 2003.

2. In this proceeding, Plaintiff contends that his disability retirement benefits should be calculated pursuant to N.C.G.S. § 128-27(d3), which utilizes "the creditable service he would have had at the age of 65 years if he had continued in service," rather than § 128-27(d4), which utilizes a formula that is less favorable for Plaintiff He alleges that

his "vested rights are and have been unlawfully and unconstitutionally impaired, diminished and violated . . . ."

3. Disability retirement benefits have a five year vesting requirement. N.C.G.S. §§ 12827(c) ("any member who has had five or more years of creditable service may be retired . . . on a disability retirement allowance"). According to his own allegations, Plaintiff could have become vested in disability retirement benefits no sooner than April 1986.

4. Plaintiff acknowledges that N.C.G.S. § 128-27(d4) became effective July 1, 1982. By its own terms, it provides for "Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982" and employs a formula which utilizes "the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance." *Id.* In *Simpson v. North Carolina Local Government Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987), it was determined that members of LGERS who were vested prior to July 1, 1982 and who later became disabled would still be eligible to have their disability retirement benefits calculated pursuant to (d3), notwithstanding that (d3) applies to persons retiring "on or after July 1, 1971, but prior to July 1, 1982."

5. In this proceeding, Plaintiff claims that he is entitled to enforce the statutory provisions for disability benefits that were in place at the time he

began work, in April 1981, rather than the provisions in effect when he became vested, in April 1986. The only legal authority Plaintiff cites in his complaint for such a claim is *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997). Notwithstanding Plaintiff's selective, edited quotes from the *Faulkenbury* opinion, the Court actually held that a change in the statutes *after the plaintiffs became vested* constituted an impairment of contract. The *Faulkenbury* Court relied upon *Simpson*, wherein the Court of Appeals stated that the plaintiff employees "had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested." *Simpson*, 88 N.C. App. at 224 (emphasis added). This holding has been reconfirmed in *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), wherein the Court relied upon both *Simpson* and *Faulkenbury* in holding that the plaintiffs had a right to rely on the terms of the statute at the time they became vested, and in *Wells v. Consolidated Judicial Retirement Sys.*, 136 N.C. App. 671, 673, 526 S.E.2d 486 (2000) ("contract is embodied in state statute and governed by statutory provisions as they existed at the time the employee's contractual rights vested.")

WHEREFORE, based on the foregoing, Defendants pray that the Class Action Complaint be dismissed for failure to state a claim on which relief can be granted.

Respectfully submitted, this the 29th day of August, 2007.

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Filed July 25, 2007

STATE OF NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE
07 CVS 011806

CLAYTON LEE PROCTOR, Jr., on behalf of himself and all others similarly situated,

Plaintiff,

v.

LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE LOCAL GOVERNMENT EMPLOYEE'S RETIREMENT SYSTEM, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,

Defendants.

CLASS ACTION COMPLAINT

Plaintiff CLAYTON LEE PROCTOR, Jr. ("Plaintiff Proctor") brings this action on behalf of himself and all other similarly situated and says:

A. PARTIES AND BACKGROUND

1. Plaintiff Proctor is a citizen and resident of Archdale, Guilford County, North Carolina, is subject to the jurisdiction of this Court, and is a retired member of the High Point Fire Department.

2. Defendant LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a corporation, [hereinafter the "LGERS"] has been established pursuant to N.C. Gen. Stat. § 128-21 *et seq.*, and is authorized to conduct all business, invest all of its funds, cash, securities and other property held in accordance with Chapter 128 of the North Carolina General Statutes for the benefit and welfare of members of the System.

3. Defendant BOARD OF TRUSTEES OF THE LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM ("the Board") is the administering Board for LGERS, is a body politic and corporate established pursuant to N.C. Gen. Stat. § 128-28 and is vested with the general administration and responsibility for the proper operation of LGERS, and is the trustee of its funds under N.C. Gen. Stat. § 128-29.

4. Defendant NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION is an administrative department of the Respondent STATE OF NORTH CAROLINA established pursuant to N.C. Gen. Stat. § 143A-31 *et seq.*

5. Defendant STATE OF NORTH CAROLINA is a State of the United States.

6. Defendant BOARD is a fiduciary in its relationship with members and beneficiaries of the LGERS, including Plaintiff.

7. Defendant RICHARD H. MOORE is the Treasurer of the State of North Carolina, the Chairman of the Board, and the custodian of the funds of the Retirement System under N.C. Gen. Stat. § 128-29(c).

8. All Defendants are residents of the State of North Carolina.

9. Plaintiff is a citizen and resident of the State of North Carolina.

10. Upon information and belief, more than two-thirds of all putative class members are citizens and residents of the State of North Carolina.

11. Defendants' acts complained of herein constitute an impairment of contract, violation of vested contractual rights, unlawful taking of property in violation of statutes, federal and state constitutional violations as stated hereinbelow, and

breach of the fiduciary duties owed to Plaintiff Proctor by Defendants.

12. Plaintiff Proctor is a member of LGERS under N.C. Gen. Stat. § 128-25, and at the times herein complained of was entitled to receive benefits under N.C. Gen. Stat. § 128-27, *et seq.*, including specifically N.C. Gen. Stat. § 128-27(d3)(1981). The denial of Plaintiff Proctor's benefits during the period herein complained of caused Plaintiff Proctor to receive less than the amount of monthly benefits to which he is entitled, as alleged hereinbelow.

13. This is a Class Acton Complaint for recompense of monthly payments of money that have been withheld and will be withheld in trust, and other relief, an Action for a Declaratory Judgment pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and for a Writ of Mandamus or other appropriate order.

B. FACTS GIVING RISE TO PLAINTIFF'S CLAIMS FOR RELIEF

14. Plaintiff Proctor began employment with the State of North Carolina ("the State") in April of 1981, serving in the High Point Fire Department. Plaintiff Proctor completed his continuous service to the High Point Fire Department when he became disabled and retired around November of 2003. During Plaintiff Proctor's service to the High Point Fire Department, he made monthly cash contributions, worked for, earned additional employer contributions to LGERS, and thereby acquired vested rights in LGERS. Plaintiff Proctor earned about a total of about twenty-two (22)

years of creditable service in LGERS prior to becoming disabled .

15. Plaintiff Proctor, as a vested member of the LGERS under N.C. Gen. Stat. § 128-27(d3)(1981), contends that Defendants have and will continue to unconstitutionally and unlawfully retain his monthly disability retirement benefits beginning on or about November of 2003.

16. Defendants' aforesaid actions violate Chapter 128 of the General Statutes, specifically N.C. Gen. Stat. § 128-27(d3)(1981), and both the Constitution of the United States, Art. 1 § 10, cl. 1 (impairment clause) and the Constitution of State of North Carolina, Art. I, § 19 (law of the land clause). Plaintiff Proctor has a vested contractual property right to the formula contained in N.C. Gen. Stat. § 128-27(d3)(1981). Plaintiff Proctor's past and prospective monthly disability retirement benefits under N.C. Gen. Stat. § 128-27(d3)(1981) have been unlawfully and unconstitutionally impaired, diminished and violated.

C. *FAULKENBURY*

17. Defendants' aforesaid actions violate Chapter 128 of the General Statutes and both the Constitutions of the United States and the State of North Carolina, because, among other reasons, Plaintiff Proctor's vested contractual rights are and have been unlawfully and unconstitutionally impaired, diminished and violated contrary to the *ratio decidendi* of *Faulkenbury v. Teachers' and*

State Employees' Retirement System of North Carolina, 345 N.C. 683, 453 S.E.2d 422 (1997).

18. In *Faulkenbury*, the Supreme Court of North Carolina held that State and local government employees' property rights in their retirement benefits are contractual. Operative terms of the employment contracts are created at the time employment begins. "**[A]t the time the [local employees] started working for the . . . local government, the statutes provided what the [employees'] compensation in the way of retirement benefits would be. The [employees] accepted these offers when they took the jobs. This created a contract.**" *Faulkenbury*, 345 N.C. at 690, 483 S.E.2d at 427 (emphasis added).

19. "[W]hen the General Assembly enacted laws which provided for certain benefits to those persons who were to be **employed** by the . . . local governments and **who fulfilled certain conditions**, this could reasonably be considered by those persons as offers by the state or local government to **guarantee the benefits if those persons fulfilled the conditions**." *Faulkenbury*, 345 N.C. at 691, 483 S.E.2d at 427 (emphasis added).

20. The "local governments **on that [hiring] date** offered certain things to the [employees], which the [employees] accepted by continuing in their employment." *Faulkenbury*, 345 N.C. at 693, 483 S.E.2d at 428 (emphasis added).

21. "The [local government employees] are entitled to what they bargained for **when they**

accepted employment with the . . . local governments." *Faulkenbury*, 345 N.C. at 693, 483 S.E.2d at 429 (emphasis added).

22. "[The State says] that the [disabled public employees] rights to disability retirement benefits did not vest until [they] were disabled, at which time the benefits had been reduced. We [the *Faulkenbury* Court] believe **a better analysis** is that, pursuant to the [employees] contracts, [the public employees] **were promised that if they worked five years, they would receive certain benefits if they became disabled. The [employees] fulfilled this condition. At that time, the [employees] rights to benefits in case they were disabled became vested. [The State] could not then reduce the benefits.**" *Faulkenbury*, 345 N.C. at 691, 483 S.E.2d at 427. (Emphasis added).

23. "[The public employees] are **entitled to what they bargained for when they accepted employment** with the ... local governments. **They should not be required to accept a reduction in benefits for other benefits they have received**. Nor does it matter that some members of the classes will receive as much or more under the revised plans." *Faulkenbury*, 345 N.C. at 693, 483 S.E. 2d at 429. (Emphasis added).

24. *Faulkenbury* requires that Plaintiff Proctor's and Class Members' disability retirement benefits should be recalculated in accordance with N.C. Gen. Stat. § 128-27(d3))(1981)(**Exhibit 1**), (the statute in effect at the time they were working and

prior to the enactment of N.C. Gen. Stat. § 128-27(d4) (1982)). N.C. Gen. Stat. § 128-27(d3) (1981) **(Exhibit 1)** provides:

> Allowance on Disability Retirement of Persons Retiring on or after July 1, 1971 — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1971, a member shall receive a service retirement allowance if he has attained the age of 65 years; otherwise he shall receive a disability retirement allowance which shall be computed as follows:
>
> (1) Such allowance shall be equal to a service retirement allowance calculated on the basis of the member's average final compensation prior to his disability retirement and the credible service he would have had at the age of 65 if he had continued in service.

25. Defendants have calculated Plaintiff Proctor's and Class Members' disability retirement benefits in accordance with N.C. Gen. Stat. § 128-27(d4))(1982), which provides:

> Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982.--Upon retirement for disability, in accordance with subsection (c) of this

> section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

26. The State has acknowledged that the General Assembly did not reserve the right to detrimentally change the retirement benefits of public employees after they began employment. *Faulkenbury*, 354 N.C. at 691, 483 S.E.2d at 427.

27. Pensions for public employees are "delayed salaries." *Id.*

28. Plaintiff Proctor and Class Members should be paid all past and future monthly disability retirement benefits due them under the recalculation of their monthly disability benefits in accordance with N.C. Gen. Stat. § 128-27(d3)(1981).

D. FIRST CLAIM FOR RELIEF

(Violation of the Impairment and Due Process Clauses, U.S. Constitution, Art. I § 10, cl. 1 &Amendments V and XIV)

29. Plaintiff Proctor repeats, adopts and incorporates by reference the allegations contained in the foregoing paragraphs as if fully repeated herein.

30. Defendants' failure to calculate and pay him his disability retirement benefits and Class Members their disability retirement benefits in accordance with N.C. Gen. Stat. § 128-27(d3)(1981), instead of N.C. Gen. Stat. § 128-27(d4)(1982), constitutes an impairment of contract under Article I § 10, cl. 1 of the U.S. Constitution and a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983.

31. N.C. Gen. Stat. § 128-27(d3)(1981) provides, in essence, that disabled local government employees who becomes disabled from work after five (5) years of service are entitled to have their disability retirement benefits calculated as if the employees had worked to age sixty-five (65).

32. N.C. Gen. Stat. § 128-27(d4)(1982) provides, in essence, that disabled local government employees who become disabled from work after five (5) years of service are entitled to have their disability retirement benefits calculated as if the

employees worked to age sixty-five (65) or had 30 years of service, which ever comes first.

E. THIRD CLAIM FOR RELIEF

(Violation of Article I, Sections 1 & 19 of the N.C. Constitution and Chapter 128)

33. Plaintiff Proctor repeats, adopts and incorporates by reference the allegations contained in the foregoing paragraphs as if fully repeated herein.

34. Defendants' acts complained of herein have deprived Plaintiff Proctor and Class Members of the enjoyment of the fruits of his own labor, property, due process, equal protection, and law of the land in violation of Article I, Sections 1 and 19 of the Constitution of the State of North Carolina, and Chapter 128 of the North Carolina General Statutes.

F. FOURTH CLAIM FOR RELIEF

(Breach of Fiduciary Duties)

35. Plaintiff Proctor repeats, adopts and incorporates by reference the allegations contained in the foregoing paragraphs as if fully repeated herein.

36. Defendants' acts complained of herein constitute a breach of the fiduciary duties owed to Plaintiff Proctor and Class Members by Defendants.

G. CONTINUING VIOLATION

37. Plaintiff Proctor repeats, adopts and incorporates by reference the allegations contained in the foregoing paragraphs as if fully repeated herein.

38. Defendants' acts complained of herein are in the nature of a continual violation of Plaintiff Proctor's and Class Members' statutory rights and constitutional rights.

H. FURTHER RELIEF REQUESTED

39. Plaintiff Proctor repeats, adopts and incorporates by reference the allegations contained in the foregoing paragraphs as if fully repeated herein.

40. As a consequence of Defendants' acts complained of herein, Plaintiff Proctor and Class Members are entitled to have a constructive, resulting trust or Common Fund impressed upon all sums of payments withheld by Defendants to which Plaintiff Proctor and Class Members are entitled, including both past and future benefits, and the actuarial equivalent of those past and future benefits withheld scheduled to be withheld, as well as interest thereupon .

I. DEFINITION OF THE CLASS

41. The class which Plaintiff Proctor seeks to represent in this action include the following:

> All persons with creditable service in the Local Governmental Employees' Retirement System prior to July 1, 1982 (the effective date of N.C. Gen. Stat. § 128-27(d4), who became disabled from work with a local government employer or who would become disabled from work with a local government employer and who would qualify for disability retirement benefits under N.C. Gen. Stat. § 128-27(d3) (1981), plus all living beneficiaries (of those aforesaid persons) who are or should be receiving monthly survivor benefits under N.C. Gen. Stat. § 128-27(d3) (1981) and the heirs, beneficiaries or personal representative of a deceased person who had the aforesaid creditable service or who would or should have qualified for the aforesaid disability retirement and who were not Class Members of *Simpson v. Local Governmental Employees' Retirement System*, 88 N.C.App. 218, 363 S.E. 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E. 2d 559 (1988).

42. The Defendants have acted or refused to act and will continue to act or refuse to act on grounds generally applicable to the class, thereby making appropriate injunctive or declaratory relief with respect to the class as a whole. Separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to individual members of the class which

would establish incompatible standards of conduct for Defendants.

43. Questions of law and fact common to the member of the class predominate over any questions affected only an individual member or members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

44. The Class Members for whose benefit this action is brought are so numerous that joinder of all Class Members is impracticable. The exact number of members in the Class is unknown to Plaintiff Proctor. However, the number of these persons is reasonably believed to be in excess of three hundred (300) persons and can be determined from records maintained by Defendants. The claims of the representative Plaintiff Proctor are typical of all members of the Class, and Plaintiff Proctor has no interests which are adverse or antagonistic to the interests of the Class.

45. Plaintiff Proctor will fairly and adequately protect the interests of the Class. Plaintiff is committed to the vigorous prosecution of this action and has retained competent counsel experienced in trials and in complex litigation of this nature.

46. The Class is proper for certification under Rule 23 of the North Carolina Rules of Civil Procedure. The claims of the putative Class grow out of the same actions and policies, rest on the same

grounds, involve identical issues of law, and apply equally to all members of the Class.

47. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted herein. Because damages suffered by some individual Class Members may be relatively small compared to the potential expense involved in protracted complex litigation against experienced and well-financed Defendants, the expense and burden of individual litigation make it impracticable for the individual members of the Class to seek redress individually for the individual wrongs they have suffered. The undersigned counsel envision no difficulty in the management of this case as a class action. Absent a class action, Defendants will likely continue their unlawful conduct, and, through their wrongdoing, Defendants will retain substantial sums improperly unpaid to the Class.

48. There are questions of law and fact that are common to the members of the Class and predominate over questions affecting individual members.

49. Class Members will be provided notice at such time and manner that the Court deems necessary and appropriate.

50. Plaintiff Proctor seeks to establish a Common Fund on behalf of the Class for both the past and future sums recovered and to be recovered from Defendants.

51. This is a Class Action Complaint for damages and other relief, and for a Declaratory Judgment pursuant to N.C. Gen. Stat. § 1-253 *et seq*, and for a Writ of Mandamus or other appropriate order.

WHEREFORE, Plaintiff Proctor prays that the Court:

1. Pursuant to N.C. Gen. Stat. § 1-253 *et seq*. declare: Plaintiff and all other Class Members are vested with past and future disability retirement benefits in accordance with the statutory provisions identified in this Complaint;

2. Pursuant to N.C. Gen. Stat. § 1-253 *et seq*. declare: N.C. Gen. Stat. § 128-27(d4) unconstitutionally fails to "grandfather" Plaintiff and other class members;

3. The Court certify this action as a class action;

4. The Court order Defendants to identify members of the class and to provide a full accounting of all past, present, and future benefits to which Plaintiff and other Class Members are entitled as a consequence of their being vested with disability retirement benefits in accordance with N.C. Gen. Stat. § 128-27(d3)(1981);

5. The Court issue and order, in the form of a Writ of Mandamus or otherwise, requiring the Retirement System and Board of Trustees to pay Plaintiff all funds past and future into a Common

Fund to which he and other class members are entitled;

6. Plaintiff and other class members have and recover of Defendants the costs of bringing this action, including reasonable attorneys fees and interest in accordance with law; and

7. The Court award Plaintiff and other class members such other and further relief as it deems just and proper.

Respectfully submitted, this the 24th day of July, 2007.

SCHILLER & SCHILLER, PLLC

By: /s/ David G. Schiller
David G. Schiller (NCSB # 26713)

/s/ Kathryn H. Schiller
Kathryn H. Schiller (NCSB # 33430)

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UNITED STATES CONSTITUTION

The Impairment of Contract Clause, Article I, Section 10 Clause 1.

"No State shall ... pass any ... Law impairing the Obligations of Contracts ... ."

NORTH CAROLINA GENERAL STATUTES

CHAPTER 128

ARTICLE 3.

Retirement System for Counties, Cities and Towns.

§ 128-21. Definitions.

The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "Accumulated contribution" shall mean the sum of all amounts deducted from the compensation of a member and credited to his individual account in the annuity savings fund, together with regular interest thereof, as provided in G.S. 128-30, subsection (b).

***

(3) "Annuity" shall mean payments for life derived from the "accumulated contribution" of a member. All annuities shall be payable in equal monthly installments.

***

(6) "Beneficiary" shall mean any person in receipt of a pension, an annuity, a

retirement allowance or other benefit as provided by this Chapter.

***

(7) "Board of Trustees" shall mean the Board provided for in G.S. 128-28 to administer the Retirement System.

(7a) "Compensation" shall mean all salaries and wages, not including any terminal payments for unused sick leave, derived from public funds which are earned by a member of Retirement System for service as an employee in the unit of the Retirement System for which he is performing full-time work.

***

(10) "Employee" shall mean any person who is regularly employed in the service of and whose salary or compensation is paid by the employer as defined in subdivision (11) of this section, ... "Employee" shall also mean all full-time, paid firemen who are employed by any fire department that serves a city or county or any part thereof and that is supported in whole or in part by municipal or county funds. . ..

***

(11) "Employer" shall mean any county, incorporated city or town, ... "Employer" shall also mean any fire department that serves a city or county or any part thereof, and that is supported in whole or in part by municipal or county funds.

***

(12) "Member" shall mean any person included in the membership of the Retirement System as provided in G.S. 128-24.

***

(15) "Pension" shall mean payments for life derived from money provided by the employer. All pensions shall be payable in equal monthly installments.

***

(19) "Retirement" shall mean withdrawal from active service with a retirement allowance granted under the provisions of this Article. . . ..

***

(20) "Retirement allowance" shall mean the sum of the annuity and the pension, or any optional benefit payable in lieu thereof.

***

(21) "Retirement System" shall mean the Local Governmental Employees' Retirement System as defined in this Article.

***

(22) "Service" shall mean service as an employee as described in subdivision (10) of this section and paid for by the employer as described in subdivision (11) of this section.

***

(25) "Teacher" shall mean any teacher . . . in any educational institution supported by and under the control of the State . . . .

§ 128-22. Name and date of establishment.

A Retirement System is hereby established and placed under the management of the Board of Trustees for the purpose of providing retirement allowances and other benefits under the provisions of this Article for employees of those counties, cities and towns or other eligible employers participating in the said Retirement System.

It shall have the power and privileges of a corporation and shall be known as the "North Carolina Local Governmental Employees'

Retirement System," and by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held.

***

§ 128-24. Membership.

The membership of this Retirement System shall be composed as follows:

(1) All employees entering or reentering the service of a participating county, city, or town after the date of participation in the Retirement System of such county, city, or town, . . . may elect to become members of ... the North Carolina Local Governmental Employees' Retirement System....

***

§ 128-27. Benefits. [1981]

(a) Service Retirement Benefits. --

(1) Any member in service may retire upon written application to the Board of Trustees setting forth at which time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired: Provided, that the said

member at the time so specified for his retirement shall have completed 30 years of service or shall have attained the age of 60 years, or if a uniformed policeman or fireman *he* shall have attained the age of 55 years, and notwithstanding that, during such period of notification, he may have separated from service.

***

(b) Service Retirement Allowance of Persons Retiring on or after July 1, 1959, but prior to July 1, 1965. — Upon retirement from service on or after July 1, 1959, but prior to July 1, 1965, a member shall receive a service retirement allowance which shall consist of

(1) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and

(2) A pension equal to the annuity allowable at the age of 65 years or at his retirement age, whichever is the earlier, on the basis of contributions made prior to such earlier age; and

(3) If he has a prior service certificate in full force and effect, an additional pension which shall be equal to the annuity which would have been provided at the age of 65 years, or at the earlier age of retirement if prior thereto, by twice the contributions which he would have made during such period of service had the System been in operation and he contributed thereunder at the rate of

a. Six and twenty-five hundredths percent (6.25%) of his compensation if such certificate is a Class A certificate, or

b. Five percent (5%) of his compensation if such certificate is a Class B certificate, or

c. Four percent (4%) of his compensation if such certificate is a Class C certificate.

(b1) Service Retirement Allowances of Persons Retiring on or after July 1, 1965, but prior to July 1, 1967. — Upon retirement from service on or after July 1, 1965, but prior to July 1, 1967, a

member shall receive a service retirement allowance which shall consist of:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, such allowance shall be equal to the sum of (i) one percent (1%) of the portion of his average final compensation not in excess of forty-eight hundred dollars ($4,800), plus one and one-half percent (PA%) of .the portion of such compensation in excess of forty-eight hundred dollars ($4,800) multiplied by the number of years of his creditable service rendered prior to January 1, 1966, and (ii) one percent (1%) of the portion of his average final compensation not in excess of forty-eight hundred dollars ($4,800), plus one and one-half percent (1^{1}/2%) of the portion of such compensation in excess of fifty-six hundred dollars ($5,600), multiplied by the number of years of his creditable service rendered after January 1, 1966.

(2a) If the member's service retirement date occurs on or after his sixtieth birthday but before his sixty-fifth birthday, his

service retirement allowance shall be computed as in (1) above but shall be reduced by five twelfths of one percent (5/12 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior, to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefit provided by G.S. 128-27(b).

(b2) Service Retirement Allowances of Persons Retiring on or after July 1, 1967, but prior to July 1, 1969. — Upon retirement from service on or after July 1, 1967, but prior to July 1, 1969, a

member shall receive a service retirement allowance which shall consist of:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, such allowance shall be equal to one and one-quarter percent (1¼%) of the portion of his average final compensation not in excess of five thousand six hundred dollars ($5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of five thousand six hundred dollars ($5,600), multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs before his sixty-fifth birthday, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one third of one percent (1/3 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday, his service

retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provision, any member whose creditable service commenced prior to July 1, 1965, and policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(b3) Service Retirement Allowances of Persons Retiring on or after July 1, 1969, but prior to July 1, 1973. — Upon retirement from service on or after July 1, 1969, but prior to July 1, 1973, a member shall receive a service retirement allowance which shall consist of

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or on or after his sixty-second birthday and the completion of 30 years of creditable service; such allowance shall be equal to one and one-quarter percent (1¼%) of

the portion of his average final compensation not in excess of fifty-six hundred dollars ($5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of fifty-six hundred dollars ($5,600), multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3a) If the member's service retirement date occurs before his sixty-second birthday but on or after his sixtieth birthday and on or after completion of 30 or more years of creditable service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the *first* day of the month coincident with or next following his sixty-second birthday.

(3b) If the member's service retirement date occurs before his sixtieth birthday but on or after completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (3a) above.

(4) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the

benefits provided by G.S. 128-27(b).

(b4) Service Retirement Allowances of Members Retiring on or after July 1, 1973, but prior to July 1, 1976. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1973, but prior to July 1, 1976, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and one-quarter percent (1¼%) of the portion of his average final compensation not in excess of fifty-six hundred dollars ($5,600) plus one and one-half percent (1½%) of the portion of such compensation in excess of fifty-six hundred dollars ($5,600), multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs on or after his sixtieth birthday but before

his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be computed as in (l) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G. S. 128-27(b).

(b5) Service Retirement Allowances of Members Retiring on or after July 1, 1976, but prior to July 1, 1978. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1976, but prior to July 1, 1978, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and one-half percent (1½%) of his average final compensation, multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs on or after his sixtieth birthday but before his sixty-fifth birthday and prior to his completion of 30 or more years of service, his service retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first

day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(b6) Service Retirement Allowances of Members Retiring on or after July 1, 1978. — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1978, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday, regardless of his years of creditable service, or after the completion of 30 years of creditable service, such allowance shall be equal to one and fifty-five one-hundredths percent (1.55%) of his average final compensation, multiplied by the number of years of his creditable service.

(2a) If the member's service retirement date occurs after his sixtieth and before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be computed as in (1) above, but shall be reduced by one quarter of one percent (¼ of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(2b) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be the actuarial

equivalent of the allowance payable at the age of 60 years as computed in (2a) above.

(3) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefits provided by G.S. 128-27(b).

(c) Disability Retirement Benefits. — Upon the application of a member or of his employer, any member who has had five or more years of creditable service may be retired by the Board of Trustees, on the first day of any calendar month, not less than 30 and not more than 90 days next following the date of filing such application, on a disability retirement allowance: Provided, that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent,

and that such member should be retired.

(d) Allowance on Disability Retirement of Persons Retiring prior to July 1, 1965. — Upon retirement for disability, in accordance with subsection (c) above, prior to July 1, 1965, a member shall receive a service retirement allowance if he has attained the age of 60 years, otherwise he shall receive a disability retirement allowance which shall consist of:

(1) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of the retirement;

(2) A pension equal to seventy-five percent (75%) of the pension that would have been payable upon service retirement at the age of 65 years had the member continued in service to 'the age of 65 years without further change in compensation.

Supplemental disability benefits heretofore provided are hereby made a permanent part of disability benefits after age 65, and shall not be discontinued at age 65.

(d1) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1965, but prior to July 1, 1969. — Upon retirement for disability, in accordance with subsection (c) above, on or after July 1, 1965, but prior to July 1, 1969, a member shall receive a service retirement allowance if he has attained the age of 60 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to the service retirement allowance which would have been payable had he continued in service without further change in compensation, to the age of 60 years, minus the actuarial equivalent of the contributions he would have made during such continued service.

(2) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered. under the Social Security Act employed thereafter, shall receive not less than the benefit provided by G.S. 128-27(d).

(d2) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1969, but prior to July 1, 1971. — Upon retirement for disability, in accordance with subsection (c) above, on or after July 1, 1969, but prior to July 1, 1971, a member shall receive a service retirement allowance if he has attained the age of 60 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to the service retirement allowance which would have been payable had he continued in service without further change in compensation to the age of 65 years, minus the actuarial equivalent of the contributions he would have made during such continued service.

(2) Notwithstanding the foregoing provisions, any member whose creditable service commenced prior to July 1, 1965, and uniformed policemen or firemen not covered under the Social Security Act employed thereafter, shall receive not less than the benefit provided by G.S. 128-27(d).

(d3) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1971. — Upon retirement for disability, in accordance with subsection (c) above on or after July 1, 1971, a member shall receive a service retirement allowance if he has attained the age of 65 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to a service retirement allowance calculated on the basis of the member's average final compensation prior to his disability retirement and the creditable service he would have had at the age of 65 years if he had continued in service.

(2) Notwithstanding the foregoing provisions,

a. Any member whose creditable service commenced prior to July 1, 1971, shall receive not less than the benefit provided by G.S. 128-27(d2);

b. The amount of disability allowance payable from the *reserve* funds of the Retirement System to any

member retiring on or after July .1, 1974, who is eligible for and in receipt of a disability benefit under the Social Security Act shall be seventy percent (70%) of the amount calculated under a above, and the balance shall be provided by the employer from time to time during each year in such amounts as may be required to cover such payments as current disbursements; and -

c. The amount of disability allowance payable to any member retiring on or after July 1, 1974, who is not eligible for and in receipt of a disability benefit under the Social Security Act shall not be payable from the reserve funds of the Retirement System but shall be provided by the employer from time to time during each year in such amounts as may be required to cover such payments as current disbursements.

***

(f) Return of Accumulated Contributions. — Should a member cease to be an employee except by death or retirement under the provisions of this Chapter, he shall upon submission of an application be paid, not earlier than 60 days from receipt in the Raleigh offices of the Board of Trustees of an acceptable application on a form provided by the Retirement System, the sum of his contributions and the accumulated regular interest thereon, provided that he has not in the meantime returned to service. Upon payment of such sum his membership in the System shall cease and, if he thereafter again becomes a member, no credit shall be allowed for any service previously rendered except as provided in G.S. 128-26; and such payment shall be in full and complete discharge of any rights in or to any benefits otherwise payable hereunder. . . .

***

(i) No action shall be commenced against the State or the Retirement System by any retired member or beneficiary respecting any deficiency in the payment of benefits more than three years after such deficient payment was made, and no action shall be

commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made.

§ 128-28. Administration and responsibility for operation of System.

(a) Vested in Board of Trustees. — The general administration and responsibility for the proper operation of the Retirement System and for making effective the provisions of this Article are hereby vested in a Board of Trustees . . ..

(b) Board of Trustees a Body Politic and Corporate; .... — The "Board of Trustees shall be a body politic and corporate under the name Board of Trustees of the North Carolina Local Governmental Employees' Retirement System, and as a body politic and corporate shall have the right to sue and be sued . . ..

§ 128-29. Management of funds.

(a) Vested in Board of Trustees. – The Board of Trustees shall be the trustee of the several funds created by this Article as provided in G.S. 128-30.

§ 128-30. Method of Financing.

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(b) Annuity Savings Fund. - The annuity savings fund shall be a fund in which shall be accumulated contributions from the compensation of members to provide for their annuities. Contributions to any payments from the annuity savings fund shall be made as follows:

***

Notwithstanding the foregoing, effective July 1, 1976, with respect to compensation paid on and after July 1, 1976, the rate of such deductions shall be six per centum (6%) of the compensation received by any member. . . ..

***

(2) The deductions provided for herein shall be made not withstanding that the minimum compensation provided for by law for any member shall be reduced thereby. Every member shall be deemed to consent and agree to the deductions made and provided for herein and shall receipt for his full salary or

compensation, and payment of salary or compensation less said deduction shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment, except as to the benefits provided under this Article. The employer shall certify to the Board of Trustees on each and every payroll or in such other manner as the Board of Trustees may prescribe, the amounts to be deducted; and each of said amounts shall be deducted, and when deducted shall be paid into said annuity savings fund, and shall be credited, together with regular interest thereon to the individual account of the member from whose compensation said deduction was made.

***

(d) Pension Accumulation Fund. – The pension accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contributions made by employers and from which shall be paid all pensions

and other benefits on account of members with prior service credit. Contributions to any payments from the pension accumulations fund shall be made as follows:

***

(2) On the basis of regular interest and of such mortality and other tables as shall be adopted by the Board of Trustees, the actuary engaged by the Board to make each valuation required by this Article during the period over which the accrued liability contribution is payable, immediately after making such valuation, shall determine the uniform and constant percentage of the actual compensation of the average new entrant throughout his entire period of active service which would be sufficient to provide for the payment of any pension payable on his account and for the pro rata share of the cost of administration of the Retirement System. The rate per centum so determined shall be known as the "normal contribution" rate. The normal rate of contribution shall be determined by the actuary after each valuation. . . ..

***

(g) Collection of Contributions. –

(1) The collection of members' contributions shall be as follows:

a. Each employer shall cause to be deducted on each and every payroll of a member for each and every payroll subsequent to the date of participation in the Retirement System the contributions payable by such member as provided in this Article. Each employer shall certify to the treasurer of said employer on each and every payroll a statement as vouchers for the amount so deducted.

b. The treasurer of each employer on the authority from the employer shall make deductions from salaries of members as provided in this Article and shall transmit monthly, or at such time as the Board of Trustees shall designate, the amount specified to be

deducted, to the secretary-treasurer of the Board of Trustees. The secretary-treasurer of the Board of Trustees after making a record of all such receipts shall deposit them in a bank or banks selected by said Board of Trustees for use according the provisions of this Article.

(2) The collections of employers' contributions shall be made as follows: Upon the basis of each actuarial calculation provided herein the Board of Trustees shall annually prepare and certify to each employer a statement of the total amount necessary for the ensuing fiscal year to the pension accumulation fund as provided under subsection (d) of this Article.

***

§ 128-35. Obligations of pension accumulation fund.

The maintenance of annuity reserves and pension reserves as provided for, and regular interest creditable to the various funds as provided in G.S. 128-30, and the payment of all pensions, annuities, retirement allowances, refunds and other

benefits granted under the provisions of this Article, are hereby made obligations of the pension accumulation fund. All income, interest and dividends derived from deposits and investments authorized by this Article shall be used for payment of the said obligations of said fund.

***

§ 128-38. Reservation of power to change.

The General Assembly reserves the right at any time and from time to time, and if deemed necessary or appropriate by said General Assembly in order to coordinate with any changes in the benefit and other provisions of the Social Security Act made after January 1, 1955, to modify or amend in whole or in part any or all of the provisions of the North Carolina Local Governmental Employees' Retirement System.

§ 128-27. Benefits. [1982]

(a) Service Retirement Benefits. —

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(c) Disability Retirement Benefits. —

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(d3) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1971, but prior to July 1, 1982. — Upon retirement for disability, in accordance

with subsection (c) of this section on or after July 1, 1971, but prior to July 1, 1982, a member shall receive a service retirement allowance if he has attained the age of 65 years, otherwise he shall receive a disability retirement allowance which shall be computed as follows:

(1) Such allowance shall be equal to a service retirement allowance calculated on the basis of the member's average final compensation *prior to* his disability retirement and the creditable service he would have had at the age of 65 years if he had continued in service.

(2) Notwithstanding the foregoing provisions,

a. Any member whose creditable service commenced prior to July 1, 1971, shall receive not less than the benefit provided by G.S. 128-27(d2);

b. The amount of disability allowance payable from the *reserve* funds of the Retirement System to any member retiring on or after July 1, 1974, who is

eligible for and in receipt of a disability benefit under the Social Security Act shall be seventy percent (70%) of the amount calculated under a above, and the balance shall be provided by the employer from time to time during each year in such amounts as may be required to cover such payments as current disbursements; and -

c. The amount of disability allowance payable to any member retiring on or after July 1, 1974, who is not eligible for and in receipt of a disability benefit under the Social Security Act shall not be payable from the reserve funds of the Retirement System but shall be provided by the employer from time to time during each year in such amounts as may be required to cover such payments as current disbursements.

(d4) Allowance on Disability Retirement of Persons Retiring on or after July 1,

1982. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and credible servers he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.